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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~543~~ ~~2 C 4~~ 8

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK L. JONES, ADMINISTRATOR OF GEORGE J. PUMPELLY, DECEASED, JAMES K. PUMPELLY, AND EDWIN C. GRAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

FILED AUGUST 21, 1880.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Wisconsin, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Wisconsin, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the United States of America and Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly and Edwin C. Gray, wherein was drawn in question the validity of a statute of, or an authority exercised under said State, on the ground of their being repugnant to the Constitution or laws of the United States, and the decision was in favor of such their validity; a manifest error hath happened to the great damage of the said United States of America, as by its complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and

2 speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1880, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 24th day of March, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] F. M. STEWART,
Clerk U. S. Circuit Court, Western District of Wisconsin.

3 (Indorsed;) Supreme Court of the United States. The United States, plaintiff in error, vs. Frank L. Jones et al. Writ of error. Filed Mar. 24, 1880. Clarence Kellogg, clerk sup. ct., Wis.

I hereby allow this writ of error.

Dated March 24, 1880.

E. G. RYAN,
Chief Justice, Supreme Court, Wis.

4 UNITED STATES OF AMERICA, *ss:*

To Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly and Edwin C. Gray, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be held at Washington, on the second Monday of October, A. D. 1880, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Wisconsin, wherein the United States of America is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 24' day of March, in the
5 year of our Lord one thousand eight hundred and eighty.

E. G. RYAN,
Chief Justice, Supreme Court, Wis.

(Indorsed:) Supreme Court of the United States. The United States of America vs. Frank L. Jones, administrator of the estate of George J. Pumpelly deceased, James K. Pumpelly, and Edwin C. Gray. Citation on writ of error. Filed Mar. 24, 1880. Clarence Kellogg, clerk sup. ct. Wis.

Due service of the within citation admitted this 26' day of March, 1880.

GIBSON & WARE,
Att'ys for Def'ts in Error.

6 Pleas before the supreme court of the State of Wisconsin, at a term thereof begun and held at the capitol in Madison, the seat of government of said State, on the second Tuesday, to wit, the thirteenth day of January, A. D. 1880.

Present, Edward G. Ryan, chief justice, and Orsamus Cole, Wm. B. Lyon, David Taylor, Harlow S. Orton, associate justices; Clarence Kellogg, clerk.

Be it remembered that heretofore, to wit, on the ninth day of February, in the year of our Lord one thousand eight hundred and seventy-eight, came into the office of the clerk of the supreme court of the State of Wisconsin The United States of America, by its attorney, and filed in said court its certain notice of appeal and undertaking according to the statute in such case made and provided, and also the return
7 to such appeal of the clerk of the circuit court of Fond du Lac County, in said State, in the words and figures following, that is to say:

Notice of appeal.

STATE OF WISCONSIN,
Fond du Lac County:

In circuit court.

FRANK L. JONES, ADMINISTRATOR OF THE ESTATE of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, plaintiffs,
against
THE UNITED STATES OF AMERICA, DEFENDANT.

To James Russell, esq., clerk of the circuit court of Fond du Lac County, Wisconsin, and Gillett and Hammond, attorneys for plaintiffs:

GENTS: Please to take notice that The United States of America, the defendant, appeals from the judgment entered in this action, and the whole thereof, in the circuit court of Fond du Lac County, to the supreme court of the State of Wisconsin.

Said judgment was entered for ten thousand dollars damages on the 13th day of December, A. D. 1876.

Fond du Lac, Wis., February 5th, 1878.

Yours, etc.,

CHARLES DEVANS,
Att'y Gen'l U. S.,
By R. L. D. POTTER,
Special Assistant.

8 *Undertaking on appeal.*

STATE OF WISCONSIN,
Fond du Lac County:

In circuit court.

FRANK L. JONES, ADMINISTRATOR OF THE ESTATE of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, plaintiffs,
against
THE UNITED STATES OF AMERICA, DEFENDANT.

Whereas on the 13th day of December, A. D. 1876, in the circuit court for Fond du Lac County, the above-named plaintiffs, Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, recovered judgment against the above-named defendant, The United States of America, for the sum of ten thousand dollars damages and forty dollars and seventy-one cents costs, and the said defendant, feeling aggrieved thereby, intends to appeal therefrom to the supreme court of the State of Wisconsin:

Now, therefore, we, Ebenezer B. Ingram, of the city and county of Fond du Lac and State of Wisconsin, and Nathan Carroll, of the city and county of Fond du Lac and State of Wisconsin, do hereby
9 undertake on the part of the appellant that the appellant will pay all costs and damages which may be awarded against it on the appeal, not exceeding two hundred and fifty dollars.

Dated February 6, 1878.

EBENEZER B. INGRAM.
NATHAN CARROLL.

STATE OF WISCONSIN,
Fond du Lac County, ss:

On this 6th day of February, A. D. 1878, before me, the subscriber, personally appeared Ebenezer B. Ingram and Nathan Carroll, to me known to be the same persons described in, and who executed, the above undertaking, and severally acknowledged that they executed the same.

JAMES RUSSELL,
Clerk Court.

STATE OF WISCONSIN,
County of Fond du Lac, ss:

Ebenezer B. Ingram and Nathan Carroll, being severally duly sworn, each for himself says: The said Ebenezer B. Ingram, that he is a resident freeholder of the county of Fond du Lac, in the State of Wisconsin, and is worth in property not exempt by law from execution the sum of five hundred dollars over and above all his debts and liabilities; and the said Nathan Carroll, that he is a resident freeholder of the county of Fond du Lac, in said State, and is worth in property not ex-
10 empt by law from execution the sum of five hundred dollars over and above all his debts and liabilities.

EBENEZER B. INGRAM.
NATHAN CARROLL.

Severally sworn and subscribed to before me this 6th day of February, 1878.

JAMES RUSSELL,
Clerk Court.

(Endorsements:) In circuit court, Fond du Lac County. Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, et al., plaintiffs, against The United States of America, defendant. Notice of appeal and undertaking. Filed Feb'y 6, 1878. James Russell, clerk.

11 In circuit court, Fond du Lac County, Wis.

FRANK L. JONES, ADMINISTRATOR OF THE estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, plaintiffs, *against* THE UNITED STATES OF AMERICA, DEFENDANT. } Case.

On the 21st day of April, 1875, the plaintiffs filed in the office of the clerk of the circuit court of Fond du Lac County a petition, in words and figures following, to wit:

Petition.

To the Hon. Campbell McLean, judge of the 4th judicial circuit of Wisconsin:

The undersigned respectfully petition and pray your honor for the appointment of three commissioners of appraisal, pursuant to chapter 119 of the general laws of 1872, and the amendments thereto, for the appraisal of the following described lands, and the damages thereto occasioned by means of the dam now owned by the United States across the north channel of the outlet of Lake Winnebago, in the county of Winnebago, in said State.

12 Your petitioners respectfully represent that they are respectively owners and occupants of the several pieces of land hereinafter described, and have so been for many years last past, and that the said dam causes great injury thereto by flowing and soaking the same by the waters of Lake Winnebago, which set back upon said lands and flow and soak the same, and are made so to do by the said dam, for which injuries compensation has not been made.

And your petitioners respectfully show that the said dam has heretofore been maintained by the Fox and Wisconsin Improvement Company, grantees of the State of Wisconsin, and by the Green Bay and Mississippi Canal Company, both being corporations under the laws of the State of Wisconsin, organized for the purpose of the improvement of the Fox and Wisconsin rivers, and that the United States has succeeded to the title and possession of such improvement and its locks and dams, of which the dam hereinbefore mentioned is one. That by an act of the legislature of said State, approved March 12, 1874, the Government of the United States was authorized to condemn real estate and property necessary to be taken for the purpose of such improvement, and that by an act of Congress of the United States, approved March 3, 1875, it was, amongst other things, enacted, that in case of the flowage or injury of any lands or other property by means of any part

13 of the work of said improvement heretofore or hereafter constructed for which compensation is now or shall become legally owing, and in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered, the amount of such compensation might be ascertained in the mode provided by the laws of the State in which

such property lies; that said dam cannot be maintained without continuance of such injuries to said lands, and that by said act of Congress and also by an act of Congress of June 23d, 1874, appropriation was made to the amount of eight hundred thousand dollars for the carrying on and completion of said improvement, of which sum fifty thousand dollars was authorized to be appropriated for the payment of damges for property taken and damaged by reason of the construction and maint*ai*nance of said works of improvement, to all which several acts your petitioners beg leave to refer, and make the same a part of this petition.

The following is a description of the lands, with the names of the owners, occupants, and parties in interest, respectively entitled to the compensation for injuries thereto, and for the taking thereof, all being situated in the county of Fond du Lac, and State of Wisconsin, to wit:

Section 1, town. 15, range 17, excepting the south half of the southwest quarter *of the southwest quarter* of said section; also excepting three acres in the northeast part thereof sold to Hiram White, and
14 also excepting about three acres near the west side and along the gravel-road sold to Fountain and Dunn, there being in said section, after deducting said exceptions, five hundred and sixty-five acres.

The claimants for the taking of injuries to said lands are Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray.

GILLETT AND HAMMOND,
Attorneys for Petitioners.

STATE OF WISCONSIN,
Fond du Lac County, ss:

J. M. Gillett, being duly sworn, doth depose and say that he is one of the attorneys for the above-named petitioners and a member of the firm of Gillett and Hammond; that he has read the foregoing petition and knows the contents thereof, and that he is acquainted with the facts set forth in said petition, and verily believes the same to be true; and further saith not.

J. M. GILLETT.

Sworn and subscribed before me April 20, 1875.

GEO. E. SUTHERLAND,
Notary Public, Wis.

After the filing of the petition, and after due notice given to the Hon. C. R. Gill, attorney for the United States, the judge appointed Robert H. Hotchkiss, George F. Wheeler, and Aaron Walters, commissioners to appraise the damage alleged to have been sustained by the
15 plaintiffs, and after duly qualifying, they viewed the premises described in the petition, heard the allegations of the parties, and on the 10th day of August, 1875, awarded to the plaintiff as compensation for damages alleged to have been sustained, the sum of eight thousand dollars. Both parties appealed from the award, and at the November term of the circuit court for the county of Fond du Lac for the year 1876, the cause came on for trial before the court and a jury.

After the cause was called and before the jury was impanneled, the defendant interposed an objection to the jurisdiction of the court, on the ground, 1st, That the court had no jurisdiction over the person of the defendant. 2d, The court has no jurisdiction to try a case in which

the United States is a party. 3d, Chapter 166, act of Congress of March 3, 1875, is unconstitutional, in that it assumes to confer upon a State court authority to try a case in which the United States is a party. The court overruled the objection, to which the defendant excepted The jury was then empanneled and sworn. The following stipulation was then made by the parties to the action in open court, viz: "It is proposed on the part of the plaintiff, that the testimony which has been used and reduced to writing by the commissioners who tried this cause, may be read in evidence with the same force and effect as if the witnesses were being sworn orally upon the stand making the
16 statements as reduced to writing, subject, however, to such objections as to materiality as may be made by either party, with leave to either party to introduce such further or such other testimony orally or otherwise as they may deem proper subject to like objections. Also stipulated on the part of plaintiffs and defendant to offer in evidence the office copies of the pleadings in the case of George J. Pumpelly vs. The Green Bay and Mississippi Canal Company, which will be sworn to as required, in lieu of the original records on file now in the office of the clerk of the United States court at Milwaukee; also that the maps which were used by the commissioners in the examination before them, may be used upon this trial without further proof, and that what they purport to show, highth, measurements, and the like, shall be regarded with the same force and effect as if the engineers making the same had been produced upon the stand and sworn thereto. The above stipulation includes the maps used as well by the plaintiffs as by as by the defendant.

Counsel for the plaintiffs then read in evidence the testimony of the following witnesses on the part of the plaintiffs, taken before the commissioners as per stipulation.

BENJAMIN F. MOORE, a witness sworn on the part of the plaintiff, testified as follows:

17 I reside in Fond du Lac City. Have lived in Fond du Lac County and in the neighborhood of Fond du Lac City about 34 years. When not living in Fond du Lac City I lived at Taycheedah. Both towns are situated at the head of Lake Winnebago. I know section 1, Fond du Lac; it lies on the lake shore, between Fond du Lac and Taycheedah. Since I lived here, for the last 20 years, have mainly dealt in real estate. I knew said section in 1852, and prior. Have known it since 1841. There has been no year that I have not been in sight of the land, and often across it on the way to Taycheedah. It is necessary to cross it to go to Taycheedah. The public highway direct to Taycheedah crosses this land. That highway has been across this land ever since I knew it. Old military road from F't Winnebago to Green Bay lay nearly in same line. This was the principal line of travel along the lake shore since I knew the land. Some years I have very often been along the road, other years not so often. In 1862 & '3 I pastured cattle on sec. 1. Was there every day; sometimes two or three times a day. The condition and character of that land when I first knew it was low, level, grass land—nearly all grass land; prairie grass. Seeing the grass now, one has no conception of its growth in 1841–'2, and '3. It was most productive then, undoubtedly no comparison with growth now. I think that I have had my attention
18 called to northeast corner of said section. A part of the town of Friendship formerly lay on the southeast end of the lake. The town line between Friendship and Fond du Lac ran into the lake

a little—followed the lake shore very nearly. In low water possibly one might have followed the town line without going into the water. The town of Friendship was north of this section line and adjoining. I don't think I knew where the northwest corner was. Could not say whether it was in the lake or not. My impression is that perhaps it was on the point north of Luco, but am not certain. There is a stream running through the section on the east side near Taycheedah. Luco Creek runs through a portion of it. Hamilton's mill lies on Luco Creek, and near this section. Luco Creek is on western side of this land. These streams empty into Lake Winnebago. They have not much fall of water. A good share of the north line of sec. 1 ran on the land when I first knew it; most of it on land, some in the water. About 15 acres of Friendship lay on that shore north of sec. 1, and adjoining the east part of it. At the time I speak of, when I first knew the land in 1841, there was no dam across the north outlet of the lake at Menasha. There is a dam now across both channels at Neenah and Menasha. I think the dam across the Menasha channel was built in 1851 & '2 There have been additions made since 1852 to the hight of the dam.

My attention was called to it when I was running boats down the
19 Menasha channels in 1853 & '4; I was running steamboats on Lake Winnebago; I ran them down both channels, Menasha and Neenah; I ran boats during 1853, '4, & '5; Menasha is situated on the north channel, and this dam is built at the city of Menasha. In 1852 I knew that the Menasha dam was imperfect; let the water through. The Menasha dam was increased in hight after 1852, from time to time, nearly every year, I think; have not known about it for past three or four years; have been familiar with condition of the water in the lake; the water in the lake has been considerably higher recently than when the Menasha dam was built; the difference is much greater at low water than at high water. I think the difference between the highth of the settled stage of the water in the lake now and before the dam was built is more than two feet. I have lived on the margin of the lake both here and at Taycheedah. I lived at Taycheedah from 1841 to 1846 on the margin of the lake; lived on margin of the lake at Fond du Lac from 1850 to 1857, at corner of Scott and Main streets. The observations made by me, and upon which I based my opinions were made while hunting along the shore of the lake for ducks and other game, and in 1845 I had a raft of logs come from the Wolf River which was left off the bar at the mouth of Fond du
20 Lac River on account of low water. They were hauled over the bar by a yoke of oxen some 15 rods across. At the time these logs came in, I walked along beach from Taycheedah to Fond du Lac, and around mouths of creeks. Water at creek's mouth was 10 to 15 inches deep. The steamer Manchester, first boat on lake, 15 to 18 inches draft in low water lay outside of bar; could not cross it; same true at Taycheedah. Discharged cargoes with small boats. Since dam has been made tight so as to hold water, and ever since, the water has been higher, so boats could go over bar at all seasons of the year—boats drawing three feet—differing entirely from first one, Manchester. I have also formed my observations from washing away of shore—especially at Taycheedah. Several roads along there have been washed away. A point at the mouth of Taycheedah Creek with bushes, etc., has been all washed away. There was a mill at Taycheedah on lake side of the road. The mill was 20 or 30 rods north and east from mouth of creek. There was one mill on east and one on west side of bridge across creek. First mill was about half way from creek to

Taycheedah, and on north or lake side of the military road. The lake is there now; ground all covered with water. There was a gravel house also near the lake; it has been washed away. Mill was located between 100 and 200 feet north from road and lay close to water. The lake has very decidedly made an incursion on the shore there. Dry land
21 on which I raised a large crop of potatoes has been washed away. Part of the land was afterwards used for a graveyard. Not so used now. The Grant house was about 100 feet out from the present road from the lake; it was entirely washed away. The house originally did not stand on the very margin of the lake, some land was in between. There was another mill on west side of creek, north of present road and between it and the lake. It was a saw-mill, and belonged to Crane. The first one was Potter's, and was burned. I think the ground where Crane's mill was, is all washed away. The mill was a long distance from the lake shore. I have made no measurement of the depth of the water in that vicinity. There were piers or docks at Taycheedah. Smith Bros. had a pier built about 1851; the pier was directly toward the lake from Mengel's store—water and ice destroyed it. The shore line was several rods further out than at present. Where Mengel's garden was, there has been great encroachment, can't say exactly how much. Near my house, corner Scott and Main streets in Fond du Lac, I made these observations. In 1848, I had land plowed to north line of block 31, 900 feet north of Scott street. It was then good hard land, good garden land, since then it has become a regular marsh, grows flags, bullrushes, etc. Lake shore was then about 3,000 feet north
22 of Scott street. In dry times a good deal of it was good mowing land. Good hay was made on it. No timber or trees of any account grew on it. Now, except where filled, it is very soft marsh; considerable is washed away. The shore may have come in from 150 to 200 feet. I once made the street across the marsh continuing Main street, and built a pier at the end, the road angling to the east a little. Think this was in the summer of 1853. The street and pier are both washed away. There used to be an Indian trail from Fond du Lac River where railroad saw-mill now is, striking near where present plank-road bridge crosses Denevue Creek. I used the trail sometimes, that trail is now all under water. The trail ran about 1,000 feet north of my house, corner Scott and Main streets. No portion of the trail is now dry ground unless a little may be, near saw-mill. The saw-mill is about 1,500 to 2,000 feet north of Scott street on bank of river. Have not particularly noticed change in depth of water. The shore between Taycheedah and Fond du Lac was originally low. There was a better defined shore than now. Near Hamilton's mill there was a pebbly shore, and clear out into lake it was pebbly. The water was always shallow at this end of lake. Think I noticed a change in the water of the lake immediately after the building of the Menasha dam. Boats could run in and out of river without grounding. The difference in depth was
23 not so apparent as in spreading the surface of the lake. A small rise would spread over a great space, because the land was so low and level. The rise was gradual for several years, five, six, or seven years, as they kept adding to the solidity and tightness of dam. Can't say positively when water reached standard hight; don't think it has changed for four or five years. From time when dam was built in 1852, a great deal of section 1 has been under water, should say nearly all was affected. Land two, three or four feet would be affected unfavorably. The soil on section 1, along lake shore is a sand ridge, south of that red clay subsoil, black mould surface.

I am acquainted with value of land in vicinity of Fond du Lac. Have dealt some in them. Don't think there is any market value of such lands just now. My opinion is that the present value of sec. 1, is that it is worth in market $40 to $45 per acre. If the land were not affected by the rise of water, I think it would be worth considerable more than now. Should say damage to land by rise of water, in market value is $20 to $22 per acre. By damaging part the whole is damaged. The south part, being good, would be worth less by reason of north part being poor. The irregular flowing in bayous, etc., through the section is much more damage' than if a solid piece was taken out. I have
24 no doubt if the land had been dry it could have been sold. The selling out of five or ten acre lots fronting on the gravel road would have benefitted the rest of the section.

(The counsel for the defendant moved to strike out all that portion of the witness Moore's testimony, that relates to the washing away or injury of other lands than the lands described in the petition in this case. Motion denied, to which defendant excepted.)

Cross-examined:

I have not any lands on which I claim damages by reason of this flowage. None of my relatives have any. I think my notion is not based only on my own peculiar opinion. I form my opinion on the selling price of lands south and southeast of town, at same distance. Don't think that all the lands bordering on lake are worth $22 per acre less. The section would sell much better in parcels of five, ten, or forty acres. I think that near a town like this, good land near wet'er land is worth less on that account. Suppose one-half the land is injured and scattered through the good part, the good half would be worth less. If the land before dam was raised was even, and three feet above water, and the dam raised the water one foot, the damage would not be as great as in this case. I don't think it would make one-third less; it might and it might not. I should say damages would be from ten to twenty-five per cent. Suppose this section had laid six feet
25 above the water, and water was raised two feet, land being level, don't think it would affect it very much. I think that where water is kept standing near the surface, the land is kept soft and sour; grows flags and rushes; have seen hundreds of acres on this flat changed from good sward to cat-tail swamps. It depends on character of soil whether it grows willows, etc. when water is only one foot below surface. I have seen men at work repairing the dam. Never paid any particular attention to it. In the low stages of water, I think it is not less than two feet higher than before dam was built. Water on the bar, I think, was not over 15 inches. The log raft came down in August or September, in dry season. I think after dam was made in low water, there were three, or three and a half—perhaps four feet of water on the bar. Now, it is between three and four feet in low water. Don't know how high my potato patch at Taycheedah was above water; I cultivated it only a year. It had not begun to wash away that I observed before the dam was built. Trees were standing at mouth of creek, on lake shore. I think the land unaffected by lake would be now worth from $60 to $75 per acre. I know dams have been put in on the headwaters of Wolf River to float logs.

26 When I first came here, the land-prairie all around was wetter than at present. I lived in Taycheedah nine or ten years. Before dam was built occasionally ice piled up. There used to be large trees on shore; now all gone; have shot ducks from behind them. A

low, sandy shore will generally gain on the water. The shore had not washed away that I observed up to the time of building the dam; have not observed since forests were cut away that the waves are higher. Saw a heavier tornado thirty years ago than we had July 4, 1873; more severe, but not so extensive.

When I first came, think there may have been some flags on section one. The water from the ledge, before ditches were dug lay on the land. The heavy growth of vegetation on section one was while the land was wet. The climate has changed some. Formerly there was more rain, and there was less chance for drainage; no ditches dug at that time. I don't know that there used to be heavy floods and overflows from the lake. I think rainfall has been much less for last ten years—perhaps one-half. I think the change in character of soil is greater in vicinity of Fond du Lac than elsewhere around here. There were no ditches then. Section 1 has been pastured very closely, which would tend to dry it, open it to the sun; some of it has been mowed; some plowed.

27 I know of my own knowledge that the dams have been repaired. Have been on boats propelled by poles down the river before the dams were built. Boats drew 18 to 24 inches. There were three portages. The Neenah channel was deeper. It was the main channel.

The counsel for plaintiffs then read to the jury the testimony of A. G. RUGGLES, taken before the commissioners as follows:

I reside in Fond du Lac, and have for about 29 years; I am a banker; my early business here was lumberman, and I dealt in land. I had a mill here in an early day; was the means of building the first steam saw-mill; it was built north of Arndt street, block 2, down where Hiner's mill is. It is where Follett street comes down east side of the river. I operated that mill little over a year. It was built spring of 1847. I became a householder in this city in 1850, and built a house in 1856 south of Arndt street on lots 51 and 52, block 10. In 1856 built a house on tract 31 on corner of Amory and Arndt streets; I resided there until fall of 1872. I have always dealt more or less in real estate in this city. I have lands on the lake shore; I owned section 2 in this town. The northern portion of lands on section 2 reached the lake; but I had blocks 31, 32, 33 & 34, original plat of this city before that. I now own the greater part of lots, 32, 33, 34, and

28 part of section 2 in this city. I have been familiar since 1846 with the stage of water in the lake; I remember the fact of the building of the Menasha dam. The stage of the water in the lake since 1852, or since the building of the dam, is considerable higher; the water affects seriously here. I base the belief in change of the shores wherever the waters of the lake touched it; I have noticed a great many facts in relation thereto. In fall of ; I started to go to Oshkosh, and saw the steamer laying off the bar; we had to run out to her in a small boat; she could not get over the bar. The winter of 1852 I built another mill; purchased the property of Mr. Moore; I directed my man to put foundation on the second bank of the river; I went to New York, and when I came back in the spring that lower bank was all flooded; I had to change location of the mill; set it further back; had to do so, because the water came up so that I could not get around it to lay foundation; when I went away in February the river was way down. When I came back it was all flooded. The

year that I speak of was 1850. That was the first effect we ever noticed of any dam; it was the first commencement of any flooding; I have been conversant with the stage of water from 1846 down to 1850. The first rise of water was in 1850. Since 1850 the water has risen year by year. The water was higher four years, three years,
29 ago than now. Generally higher in early portion of summer. The facts that I have observed to show that the water has risen year by year are these: In 1846 there used to be a ford at Arndt street. People could cross on foot; man pull his pants up and cross dry-shod. It went along from year to year increasing. Have had a dredge there for twenty years or more. They have been unable to ford the stream since 1852 or 1851. At times the water was quite deep. We put the mill right north of this ford; when the wind blew from the north it would shove our logs over this ford, and we would have to draw them down. The mill there now store their logs over this ford. In the year of building the first mill, I lived at Fond du Lac House. Would turn my horse loose; when I wanted to catch him, would have to go down where Darling used to mow block 33. Would go down and catch him, with low shoes, and never get my feet wet. Now one would go head and ears in mud and water; any time in the last ten years could not go there any way only by a boat. I have noticed the shore-line, so I can tell where the shore-line was before the dam was built. Lot 34 lies north of 33. The shore-line, then, was on 34, quite a high bank; 33 had also some high ground. That cannot be found—all cov-
30 ered with water. Mr. Fitzgerald and Moore owned boats here then. Mr. Moore built a roadway and pier. It was an extension of Main street. The boats landed at that place two years. That pier has been washed away, as has the roadway. The water commenced to wash the roadway away, and after that the pier. In my opinion the water has been raised since the dam was built in the neighborhood of five feet. It is a matter of judgment, looking at the banks as they then were and now. The character of the land generally, from Scott street to the lake, was low, but dry. Near the lake was a bank, which has been washed away. There were trees on the bank of the river; quite a growth of woods. Some bushes north of Main street, thorn-apples, etc. There was quite a growth of burr-oak trees on block 22, west of Main street. The old Fond du Lac plat reached to the then lake shore, 31, 32, 33 frac., 34, 22 frac., 13. There was no flowed land north of Scott street prior to the building of the dam. There were good building places north of Scott street. Moore built where Mihills now lives.

I remember, to a certain extent, the water-line of section 1. In early days used to go over there frequently to Taycheedah. It has changed since then. The water has worked in, encroached upon it very considerably. I don't know where the northwest corner of the section is. I knew about the line; I knew about the Potter mill. That mill stood
31 on the bank of the lake, about three or four hundred feet from the creek. I was down in 1846 to the Crant's house; knew the banks then. That house was on high ground, south of the mill; where the mill was is washed away. I knew all about the mud brick house of Arimond. It was built on the bank of the lake—quite a bank between it and the lake. The water undermined it, and it was washed away.

I knew section one. I have known it more or less since 1846. The general character of that land was good, desirable. It was supposed that property was valuable. It was not used as a farm, but was good,

desirable land for farming purposes. The land lying north of the plank road seems to have been flowed. None of it was flowed formerly. The line that is now on the lake, I don't know where it was then. The land at the left of the plank road was dry; there was quite a bold shore; there was an old Indian-corn ground, and in driving over the road you could see the corn hills.

Cross-examination:

I don't think I can tell how much of that section has been flowed; cannot tell how much is left without a foot drainage, nor how much two feet. To have arable land ought to have five or six feet. The kind of soil makes a difference; clay bottom at lower drainage; sand, higher. I have land that I claim is flooded by the dam—several hundred acres.

Clay subsoil needs about five or six feet drainage, same as Pum-
32 pelly farm. Where I own a farm that I have worked, I found I could not grow crops as well when water was so close underneath. I sold a farm to a man; he dug a well on it; should think it was eight feet deep, possibly about three-fourths of a mile from the lake shore. The land I am talking about may be ten feet from level of lake. My crops were oats; would have had a better crop if Lake Winnebago had not been there. On my farms, on the ledge, got good crops, but it was a disapointment generally down there. I came to the conclusion many years ago that I would not farm it on that land for a living. My observation satisfied me that the dam caused the damage. It is a guess with me as to the amount of drainage land requires. My recollection about that well, was that he struck clay, but it was a sandy soil, and it caved in. The Pumpelly tract would sell best in small pieces on the road; back, in large pieces. I should think if the whole land was ten feet above the level of the lake it must be affected by the water. I cannot say that I have made any observations about the hight of land affected by water. I have known a gravel vein only a few inches wide sufficient to take the water away. The clay will be moist, but water cannot run through clay. I dug down twenty-five feet, got no water; dug twenty-five more, and found water. Sold land near that, and man

dug ten feet and found a well. I dug well 120 feet and abandoned
33 it. Went 100 further, and found water at ten feet. Can find gravel on section one. There is gravel on right of the road on this section. I have not seen big crops growing on the banks of rivers. My theory about water affecting crops is not made from personal observation, but is merely my judgment. Think that the complaint about poor crops is confined to this kind of land. My testimony in regard to the value of that land was, that the lake has driven off men from settling in that country. The business interests of the city would have been better to-day had the dam never been built. The river was as navigable always as now. The landing-place has never been changed. If this section were to be used for purely agricultural purposes, the same would be worth much more than the figures I stated before dinner. I think I would risk hell on the statement that that land would not be worth as much two feet above the level of the lake as five or seven feet. I know where there are two gardens that are spoiled by the water; don't think the water was as high in the last two or three years as it was four years ago. On the north portion of lots 22, 33, 32, & 34, the water was higher than now. Don't think the water has been as high since the slash-boards have been taken off. I

never thought that any dams on the Wolf River would affect the
34 water in the lake here if there was no dam at Menasha. I be-

lieve the old steamer did not land much at Fond du Lac; when she did, everybody knew it. I don't think that a change in Wolf River, say a good many dams, would make a change in this lake. The water, at the foot of Arndt street, I think is about 8 or 9 feet. I never made any measurements. They could ford there at all times with a wagon. Once in a while, when the wind blew from the north, they could not cross. There is always higher water now than then. I have a case at issue against the Green Bay and Mississippi Canal Company. I know that the dams have broken once or twice, and that the water went down at once. Dr. Gray has never talked with me about the land, only that he would like to have me as a witness.

Redirect-examination:

I think the water gets lower in dry seasons than now; it don't vary much now from ordinary stage; a good wind from the north will raise the water from 1½ to 4 feet. Land situated only two feet above the level of this lake subject to being overflowed, it would not be safe to crop.

Recross-examination:

Good farming lands are held around here, from $50 to $75. Farms about one mile out cannot be bought for $75. Some cannot be bought for $200.

H. W. NEWTON, sworn by claimants, states:

Have lived in Fond du Lac for 30 years. I am a surveyor and en-
35 gineer by education. Have been county surveyor. Know section one. (Map shown witness.) I made that map. It was made about 3 years ago, in '72. That map was made from actual surveys and measurements. Part of the measurements were taken immediately before the map was made and others some time before, in April or May, I think. That map accurately shows the outlines of the section and the location of the streams. It accurately shows the boundary of the lake at that time. Those figures show the height of the ground above the lake at that time; not all of them are above. I distinguish the marks that show the water on the land and the height of land by minus signs that indicate the depth of the water. Those figures indicate the place on the land where the water stands on the land. I ascertained the figures by ordinary level and rod. I cut a hole through the ice just south or Luco Bridge and took the water there. The streams on the map enter the lake. The red line on the map indicates land about 2—2½ feet above the level of the lake. It is the margin. The ground between that and the lake is about 2 or 2½ feet above the standing water. The colored lines indicate low lands, lower than the rest of it. I have not been very intimate with the land. Been on it more or less in the last 25 years. In times of high water some of that land is flowed. At all seasons of the year some of that land is flowed. There is a certain part of sec-
36 tion one that was sold by the government, is constantly covered by water. As near as I could ascertain the north line of the section is correctly marked on the map. I had a copy of the meander lines of the lake. It seems in those field-notes that there is a discrepancy in the field-notes, as it carries the line farther into the section than here. I traced the exterior lines of the section. At the time I made this survey the section was all fenced, the corners were fenced, and the lines run that way made them correct. The corners were mounds and had always been used as the corners. The field-notes called for posts and mounds. I think that there is no mound can be found there. The

quarter-post is there, as can be seen; a fence-post marked Q. S. Don't know where the northwest corner is. Never saw the tree. There are no distances given on my map. Think that is a copy of the meander line. (Small map shown witness.) That corresponds with the map I made. I think by the looks that the lake shore crowds in a little more than they would on the original. About two years ago I measured the distance from the NE. corner to the lake. It was some, about, 80 rods. The government notes called for 20 rods less than a ½ mile. I have been at a point where the west point meets lake shore. This was when I made this survey. I think that the distance from the SW. corner to the lake was between 5,000 and 5,100 feet. The exact length was 5,085. On the south line of
37 the section there was about three rods short. I have no positive knowledge as to the relative height of water now and in former days, but have recollection. At Taycheedah, on this side of the creek, there used to be a mill and a fountain. The shore was about 80 rods from this in 1852 or 1853. Smith had a dock down at Taycheedah. The shore then was 12 or 14 rods from where it is now; 1856, on section 10, in Taycheedah, I set a corner. The bearing-trees were still standing when I went again in 1868, and the corner was out in the lake. I think that the lake had encroached about one or two rods. The soil was sandy, with timber, small trees, not very large, not more than 6 or 8 inches through. In about 1860 the SW. corner of section 17 was about 3 rods in the lake; yes, 4 rods then. The water was a foot or more through. The section corner is about two miles from Taycheedah. The stump we saw is about 8 rods from the shore. I remember about the gravel house; part of it is under water; guess all of it would be in high water.

Cross-examination:

The water is encroaching on the shore. Whether it is any higher or not, I have no means of knowing. The action of the water is to wash away, and where there were any trees they would fall over. There was in the summer of '45 or '46. Father cut a good lot of hay where the railroad mill now stands, about ½ mile north of Scott street. It
38 was ravine, wild red-top. Don't remember much coarse hay being cut here. Don't think the grass was any coarser north of Main street than where it was cut at the former place. The general slope of the land was uniform down to the water. The natural lay of the ground from the lake shore, as it might have been in 1845, 1846, was about 10 or 12 feet to the mile. In 1845, in walking down Main street, after wetting your feet, you might walk ½ mile before getting up to your knees. Take it at the NW. corner of section, one might walk there 40 rods without getting up to his knees.

By HUBBELL. All along the shore down to Taycheedah there was a gravel bank.

By GILL. George Gillet assisted me when I run the level. There was no snow on the ground. It may have extended into May. I have no data that I could accurately show the depth of the water. I made a mark on a willow tree near Taycheedah, but it blew down. I have had some experience as an engineer; my assistant was a pretty accurate young man.

N. BOARDMAN, being sworn, says:

I reside in the city of Fond du Lac, and have for 23 years. I am a civil engineer, and have been since 1844—31 years. I am acquainted

with the section of country around Lake Winnebago. I am familiar with the section of country around and about the dams at the outlets of Lake Winnebago. I have made some levels and
39 assisted at some at the outlets—first was in 1866. I have not the notes of my levels taken at that time. The principal notes that I have are those made with Mr. Hearding some weeks ago. The first levels that I took of which I have notes were taken about one year ago. I was endeavoring to ascertain at that time the height of the Menasha dam. It is in the same condition then as now, in these notes. The maps now shown me are the same as the notes and measurements taken by me and Mr. Hearding. Those maps correspond with what I took one year ago, except what might be the different stages of water. These are more complete. In so far as I took measurements one year ago, they correspond with the present map. The top blue line represents the surface of the water, where there is water; that is, at the stage of the taking of these last minutes. The measurements from which these maps were made were taken commencing June 3d, running down to June 16th, 1875. The heavy bottom line represents the average bottom or depth of water in the channel. The extreme bottom line, not dotted, represents the deepest line or average line of the bottom of the channel. The upper or left-hand map represents the upper end of the channel on the lake. The left-hand cross-section of the map is near the head of the Neenah channel, the next 300 or 400 feet below it.
40 The 3d is at the railroad bridge, below the dam 8 or 900 feet. It is just 800 feet. The 4th and last cross-section is at the wagon-road bridge, 1,400 feet below the dam. That map represents, in extreme length, 7,700 ft. From Lake Winnebago to the dam is 5,000 feet. It's a crooked channel. It is an irregular, wavy channel. At the first cross-section the channel is 520 feet wide. The extreme depth of channel at that point, 8.25 feet; average depth, 5.4 feet. At the second cross-section it is 450 feet; 7.6 feet the deepest; average, 5.56 ft. At first cross-section, below the dam, the channel is 540 feet wide. Extreme depth, 3.79 feet; average depth, 2.75 feet. At lower cross-section it is 320 feet; greatest depth, 4.95; average, 3.07 feet. Our measurements on first cross-section were every 40 feet; second the same; the others about every 50 feet. The fall in the surface of the water, from the lake to the dam, is 685 feet about 8¼ inches. The fall in the average bed of the stream, from the lake to the dam, 5.511 feet, or 5 feet 6 inches and ¼ to lower base of the dam. The little point on the upper base of the dam is flush-boards. The elevation of the flush-boards is 1⅛ ft. They are constructed on the Neenah dam. There is a hinge that turns down on the dam. The extreme top line is an accurate level of the surface of Lake Winnebago. This map truly represents the level of Lake Winnebago as far as it goes. The mean surface of
41 the bed of the stream, that is its highest point, is at the head of the channel near the lake. The depth of the water there is 5 ft. 2 in. The water there is the most shallow of anywhere in the channel. The Neenah dam is 7.827 feet high, nearly 7 feet 10 inches, without flush-boards. That is the height at the lower base of the dam.

(The above describes the Neenah dam.)

Menasha dam.—The extreme length of that map is 10,540. The distance from the dam to the lake is 6,300 feet. We determined where the channel commenced by the points of land at the entrance of the lake. The depth of water there is 6.068, say 6 ft. ¾ in. The first cross-section was taken just above the dam, about 1,000 feet. The width of channel at that point is 420 feet; extreme depth at that point, 8.07;

average, 6.15. The next cross-section was 300 feet above the last; 1,300 feet above the dam. The width of channel there, 485; extreme depth, 9.8; averagé, 6.38. The next cross-sections were taken below the dam, in the canal. The shallowest water is 2,800 feet below the lake, 3,500 feet above the dam; the depth of water, 4.8; that is, the mean depth; should say it was about 450 feet wide there (have not the accurate measurements). The third cross-section in the canal is about 100 feet below the line of the dam; the width, 135 feet; mean depth, say 5½ feet; greatest depth, 6.56. The next cross-section is in
42 canal, about 300 feet below that, 6.49 greatest depth. This, I should say, was 5¾ ft. Those cross-sections represent it. The water escaping over that dam has an outlet, or escapes into the canal, and, when water is high, into the channel. That map represents the river and does not show the canal. At its lower base that dam is 5 ft. 11 inches ½ (5.946). The point on the top of the dam represents the flush-boards. They are very irregular. At some points they are 14 inches. At the highest point they are 2 feet 1 inch. They will average about from 18 to 20 inches.

By COM. What was the stage of the water?

Answer. We should call it pretty high water; some of those flush boards extended out of the water.

By COM. Did the irregularity of the boards indicate an irregularity in the dam?

Answer. It did.

We ascertained the height of the dam by an average of its height. The solid structure of the dam was irregular on the top. I have not got the variation, but think it would be about 8 inches or more. In speaking of the height of the dam, I speak from the average depth of the stream and base of the dam. The fall in the bed of the stream from the lake to the dam is 2.265 ft. The fall in the highest point in the stream to the dam is 3.533 ft. The extreme depth of the channel, at the point where the lake enters the channel, 7.2. The extreme depth at the shallowest point, 6 feet 1 inch; at deepest point,
43 9.88. The fall at the shallowest point to the extreme depth at the dam 4.77 ft. The fall of the water from the lake to the dam is .0333, just 4 inches. These depths of water I have been giving are all from the level of Lake Winnebago, as represented by the red line. I am of the opinion that it applies to the Menasha dam, and not to the Neenah dam. Those figures as to the depth of water in the canal were from actual measurements. The water in the Neenah dam would be just as stated, and in the Menasha dam you want to deduct about 2 inches on the average. The only difference is in the channel above the Menasha dam. The fall in the channel is in the Neenah channel, about .68, and there is more fall in the Neenah dam than the Menasha dam. The difference between the two dams from the bed of the stream, 1.88 feet, the Neenah dam being the highest. In reference to the surface of the lake, the Menasha dam is the highest, .43 of a foot. It is .43 of a foot nearer the surface of the lake than the Neenah dam (Menasha dam). The Menasha dam from the top of the flush-boards is nearer the surface of the water than the Neenah dam about .57 of a foot—that is, averaging the flush-boards at 20 inches from the surface of the water in Lake Winnebago to the bottom of the channel at Neenah is 10.647. From the lake to the bottom of the channel at Menasha,
44 8.333. I speak now of the average bottom below the surface of the lake. The Menasha dam is a brush dam, built with timber and trees. Below that it is built with logs and crib-work. There was

some water running over the dam at Menasha, some water being drawn through the canal. We took some measurements of the currents. Where the cross-sections were made about the Menasha dam, surface current, velocity of current per second, .696 per second. Current below in canal 1.84 per second. That water at Menasha dam was used at that time for milling and for the canal. Quite a number of boats went through. The water from the mills discharge into the stream. There are water-mills on the canal. They discharge the water into the bed of the stream. Measured the currents in Neenah dam at cross-section, 1.38 per second. If either dam has been maintained by government, it is the Menasha dam. Those flush-boards were about ½ on when we were there. The flush-boards were on the Menasha dam. They have always been on there. They were always maintained about as they are now. I have not seen the water as high as now.

By COM. Did you ever notice that it would fill up in the night and empty in day-time?

A. Yes.

At the Menasha channel above the dam the water runs out about 1,909.77 cubic feet per second. When the mills are running, about 1,403.46 discharges in the canal, 506.31 discharges over the dam.

45 In the Neenah dam 3.518 per second is discharged *per second.* The waters of that channel are used for milling and manufacturing purposes exclusively, and that dam is maintained by private parties and built by them.

I have been familiar with the shore at the head of the lake for 23 years. I first became acquainted with it in the summer of 1852. I have made surveys on this shore various times between 1853 and now. At principally between here and Taycheedah and between there and Calumet. The general shore of the lake between here and Oshkosh on west is low. That low land continues on to Taycheedah. From Taycheedah north on the shores it is somewhat higher. I made my earlier surveys between here and Taycheedah; made some 4 or 5 miles below Taycheedah; made surveys on sections 1 and 2; have made some city surveys at mouth of river; made them on sections 1 and 2 in 1853 or 1854; I was running section line between 1 and 2; made some at Luco. When Hamilton bought that property the northeast corner of section 1 was about 35 chains from the lake shore, but did not at same time run the west line to the northwest corner; the NW. corner was at that lake shore; the bearing-tree was there, but was down. That tree stood a little NW. of the corner, 41 links, according to government survey;

46 it was white ash, 14 inches in diameter. That tree is not there now; I should judge it had been washed away or carried away by the ice; it was a dead tree. It was a sound tree. That was the first time I ever observed that the water encroached on that corner; can't say how much, but the water was 1 foot deep on that corner. The shore line was right almost there close to it; when the water went down you could stand there. The shore line was 2 rods south of the NW. corner. Other trees were standing there near to the bearing-tree, which was undoubtedly the shore line; the tree was north of the corner.

None of the balance of the north line of section except the 35 chains was out of the water. The 35 chains were at northeast corner. I have made surveys on the N. and W. lines of section since '53 and '54. I made my next surveys in 1866. The length of line out of water at NE. corner was then 24 chains, running west. The stage of water then was lower than in '53 or '54. The survey of '66 was made in September.

At the time this survey was made the water was at ordinary low stage. There was a margin of two chains where shore had been washed by high water in spring. In high water that year the section line out of water would have been about 20 chains long. In Sept., '66, I found that shore at NW. corner had worked in to the land. I then found shore line had receded 1 chain and 40
47 links. The land at first was a little ridge, then a marsh going south. The shore line was only a foot or two high. At first survey, the character of surface from shore to gravel road was about same as at second. Made my next survey about 2 weeks ago. The shore line out of water at NE. corner was then 19 chains 50 links, to edge of water as it now stands. I found that shore at NW. corner had worked still further into the land. It was 5 chains. 30 links from NW. corner post to the shore. The shore line is low. The bottom shelves very gradually, not level, but somewhat in ridges. At NW. corner post the water is 2 feet 9 inches deep. The water permanently covers 14½ acres, as near as I could get at it, between the meandered line and the present shore line. I used map made by John Bannister in 1849. He traced line himself. Government platted and sold sec. 1 for 590 A. There is now out of water 582 acres, nearly. There must have been in section when sold by government more than 590 acres. By original surveys I should say the section originally comprised 582 and 14½ acres. Taking section as originally surveyed, and as it now stands, the difference is 14½ acres. I have observed the shore line occasionally at other times than my surveys; hunted there. The water has been gradually encroaching since I first knew the land. I first noticed any particular encroachment between survey of 1854 and 1866; I have no exact
48 knowledge of the amount of rise of water. Have been over the land a good deal at various times. Gov. Tallmadge was a half owner, and I was connected with his family. It was for him that I made my first survey. The section then was nearly all wild prairie. There was no standing water of any amount besides the lake water. Perhaps a little on E. line of section, where Taycheedah Creek crosses, space, creek, and all, 8 or 10 rods wide and extending up creek 200 or 300 feet or more. A little in marsh, near Luco. Nearly all section seemed arable land except a little in SE. corner, where there was a little marsh, where a ditch has been dug since. This was in '52–'3–'4. The land doesn't seem to have changed very much, except at lake shore. Haven't been over it at high-water since '66. A north storm causes water to flow up on the land more, and up Taycheedah Creek; up Luco, too, a little. And where there is low land it would tend to make water rise on it. I took a few levels on the land at high-water in 1866; think in spring. Took them along in the wet places, north and south of gravel road. The sloughs or low spots north and south of road were then covered with water. I made approximate estimate that there was about 76 acres under water, not including what the lake covered. The lake then covered, between Bannister's line and low-water, about 10 A., and the high-water covered 8 or 9 acres more, making 18 or 19 acres, besides 76 acres—95 acres in all. The water stand-
49 ing on land was on a level with the lake then. Haven't seen the section flowed since then. I have no other levels. Deduct about 2 ft. from level figures on map of May, 1872, and it would give height of land above water at time of high-water in 1866. The red lines denote the outlines of water at that time. I think the red lines indicate about the form of flowed places.

Cross-examined:

Don't think I have seen any water as high as in 1866 at any other time, but I have been absent some of the time, in '62, '3, '4, and '5. Been here since at some time every year. Water then stood high 2 or 3 weeks in May and June. There were heavy rains. It was at last of May and first of June.

JOHN MCCORMICK sworn.

Live at Taycheedah. Been there 23 years, within few rods of Taycheedah, on lots 6, 7, 8, and 9, block 18, village plat. Have lived on those lots for 15 or 16 years. Before that lived a few rods further south. Am laborer. Have noticed water in lake as to whether it has risen. The water is much higher now than when I went there first. I know it by places I have seen washed away, that were tillable land when I came there. I refer to a great part of the shore, as I have worked all along there. It is about 180 feet from my lots down to the shore The shore-line does not stand where it did then. The Potter saw-mill was on the shore when I came. It was 12 rods, about, from road to
50 the water then. There was a lumber and log yard from road to front of mill. The mill stood pretty near the water. There was a bay running in for logs. Plank road was partly built. It was built opposite mill. The old military road was some way further south. The mill burned down. The land where it stood is all lake now. The land was 3 feet above lake. None of that land is left between road and lake. There was another saw-mill at the bridge, on west side of bridge, and about 80 ft. from road. There was land—quite a big piece—between mill and lake. That land is gone. Mr. Geiss owned a flouring-mill at Taycheedah. It is there still. There was a saw-mill on north end of grist-mill, between it and lake. I have been at section corners of sec. 1 and 2, Fond du Lac, many times. Haven't been there for 3 or 4 years. Have cut grass there 16 years ago for Gov. Tallmadge. Tree near corner, large tree. At same places have cut grass 10 or 15 rods from tree, southeast from tree. The tree was growing finely then. Have been there since, followed my cattle there. Was there about middle of May, this year. Tree isn't there. It was heaved up or torn up, and has been washed away. Think water is from 3½ to 4 feet higher now than then. I judge mostly from high banks and land there being washed away.

(The counsel for the defendant renewed his objection to any evidence being received showing damage to any lands by water around
51 Lake Winnebago, except the lands of the plaintiffs. The court overruled the objection; to which ruling and decision of the court the counsel for the defendant excepted.)

Cross-examination:

Think it has been growing higher from year to year. Land has disappeared that was there ten years ago.

Redirect:

Have seen water so high that teams could not get across bridge over Taycheedah Creek. This was about nine years ago; there was a heavy storm.

The testimony of Luther Holmes was then read as follows: I came here in 1858. I was in business in Taycheedah and living in Fond du Lac, about 4 or 5 years. I had a distillery there, about a mile from there, below Taycheedah. I was frequently passing to and from Fond du Lac to the distillery, once or twice a day. I did not run every summer;

one summer I think I did not run it. My route was along the lake shore road. I did observe the stage of the water in the lake while passing. I have seen it every year but this year. Some seasons it was higher than other seasons; always highest in the spring. I was familiar with the lake shore by Taycheedah Creek. It was pretty high water there before '58. I was living in Sheboygan in 1854. Came here first in 1853, and went to Sheboygan. When I lived in Sheboygan, and before I came here, I was in the habit of passing between here and there. When the roads were good I was out here once a week. There
52 was one year, 1855 or 1856, I noticed the water was high, about up to the plank on the bridge and over the road. Think it was in the spring of the year. Can't tell the month nor how long it lasted. Bed of the road was wet. Don't think it was the plank road. Know the bridge is now 3 feet higher. It was moved from its foundation in '65 or '66. It was moved by water, I think. I saw that the stringers and plank were shoved south. Vankuren owned the road. I can't tell when he took charge of the road. Travel was suspended until the bridge was rebuilt. Never have seen the water as high since that time. It was days and weeks. They were not floated off, but kind of rolled up to the south. That's the highest water I ever saw. There was a building by the creek with machinery in it; either a saw or shingle mill; lumber-mill of some kind. There was on the east side of the creek a pressed-brick, building on lake side of the road. The shore line has changed. That building there and garden, all thrown down by water. Don't know whether the garden was on the north side. There was dry ground on the north side. Not before 1854, but was before 1858. I saw them building the house; it stood there. It was built as early as 1856; might have been before. Was knocked down at time of great freshet above spoken about. Can't tell how much the shore has changed. Quite a large tree out in the lake with large branches way out in the water. It went down about the time the house did. I knew section one.
I knew it in 1853 or 1854. Large grass was growing there. It was
53 not fenced. It was fenced before I came here to live. I have pastured stock there. Hunted there during the war—1865 or 1866. I never went over that section—let me see: 1858, the year I moved here, drove over same in winter. Went there some, after, to hunt birds. There was deep, rich soil there undoubtedly. I have seen water, from the bridge at Taycheedah, reaching up this way to the high ground I spoke about, of land south of road up to the ground south where the oak trees were standing in the road. Water went almost up to the railroad. There are some trees about one-half way from Luco to Taycheedah. The water was up to that, not on the road, but in a southeasterly direction, in the low ground. Came up to a point south and east of the first trees. Saw men on section, fishing. That was in big freshet. Do not know how many acres were covered. Have seen water in low places. Have been down there recently. In years gone by don't think they plowed down to where water came. I talked of buying land down there in 1862. I was talking of buying 5, 10, 15 acres of land. Afterwards wanted to buy larger tract in 1867 or 1868. I tried to buy the whole of it, or some of it. Proposed to pay last time. No, there was no price. The first time I wanted it I proposed to pay $60 per acre. Next time was in 1867 or 1868. Talked with Pumpelly and James; offered him $1,000 rent per year. Trouble was to get the title.

54 Judge HUBBELL wants to know the condition of the land.
It has been plowed, fenced; railroad runs through; don't

know anything about its productiveness. Seen good crops there; they had a big piece of flax there. Dick Charles put it in. Don't remember what became of the crop. The rise of the water has affected the land since I have known it. It was in June or July, 1853, that I was there. There was a large growth of grass there. The shore of the lake is wearing away, and the water encroaching upon the shore. Can't recollect any stumps; trees were standing, that have gone down with the water. There has been a rise of water since I have known it. I would have bought the land where the mill was, but she wouldn't sign the deed. It was in 1862, I think.

Cross-examined by C. R. GILL:

All the land around Fond du Lac had large grass. Don't know as have noticed any difference much from other lands. Surface country around Fond du Lac was wetter then (1853) than now; a kind of vegetation grew around here then that does not now. Feeding and plowing changed this; dryness changes it too. Didn't notice any flag on section one. I would not call an overflow of land for a day or two detrimental to land, if I could have my choice as to the time when overflowed. I would not call an overflow of Lake Winnebago as much advantage as an overflow on the Mohawk, as there was no deposit. I was not familiar with soundings. Been there in swimming,
55 and had to wade out a mighty ways to get water to swim in; had to wade out in the water about one mile north from Taycheedah, until I got about sick of wading, before could find water enough to swim in. I do not know the necessary height of land above the water not to be affected by the water; depends upon how porous the land is. I have never had any experience as to how far the water will extend under the ground in a lateral direction. I don't know as I would consider land 2 feet above surface or level of lake as injured by water. I offered $60 an acre for land by Luco Creek, on south side of creek. My 10 acres I wanted to buy came up to the creek, running back to the ravine opposite the flax mill.

The testimony of JAMES MOORE was then read as follows:

I reside at Luco, at Hamilton's mill, about half way between here and Taycheedah. Have lived there about one year last April. I have been a resident in this section of country for the last 33 years. I came into this State in 1843. I went to Taycheedah in 1846. I lived at Pebble's Corners for about three years, in Taycheedah two years; from there in the town of Forest, two years; from there, the balance of the time, in Taycheedah. I have been familiar with this section of country since I came here, and have worked around and about this country every year. The water in the lake, or the margin of the lake,
56 has changed materially; the shores have changed considerably. The water, as far as I can judge, has risen 3 or 4 feet, and many of the old landmarks are gone about Taycheedah, where there used to mills stand, especially. There is a place I remember well on the north side of the road, and east of creek, between the bridge, and there was a piece of corn where Mengel's store now stands, as the road then run, said to be 7 acres, which is now all lake; should judge it was about that; it was called so. There were no buildings on that land. Think this was in '48; may have been earlier; was about that time. Afterwards buildings were built on this 7 acres; a brick building, pressed brick, gravel and lime; a respectable building as to size. A number of years afterwards, about 20 years ago; may not have been that; it

may be 20 years, may be some time since; don't pretend to be accurate as to time; my memory is not correct as to dates. That has gone with the soil; all washed away. There was quite a garden—a splendid garden—next to the shore. Mr. Arimond built the house. At the mouth of Taycheedah Creek, on each side of the stream, there was a growth of trees and bushes; quite a high bank. The shore ran out about 30 rods from the present bridge. They were high, and lined with trees. What makes me remember was when this railroad was commenced to be built, I had a contract to deliver stone to the R. R. I took them to Taycheedah Creek, and delivered them on a scow at the
57 bridge. It was after the plank road was built to Sheboygan. It hadn't been finished clear through. My impression is it was when Bradley and Strong commenced to build the Rock River Valley Road. At the time I commenced to haul this stone there was not an average rise of water in the lake. I think it was in 1852 or 1853. I couldn't tell exactly when it was. The Menasha dam was not built then. It was built a year or two or three years after that. The mouth of the Fond du Lac River has changed. Trees that were standing there are gone. At the point that made out from the northwest corner section one, there was a tree three or four feet through standing near the northwest corner section one; stood north from the corner, standing on land; it was a rod or two from the shore. That very same tree, stump of it, and part of trunk, has been washed up on the present shore. The water was north from the tree. There was a point made out at that day and a cave made in the west line of section one, and run out on that point. Can't remember when I saw that tree standing; may have been ten or twelve years ago that I last saw it standing; saw it yesterday down. It used to stand about 30 rods north of where it now is. When I delivered stone it was at the bridge where it now stands; same foundation. It is not as long as it was then; don't think it is the same height; it is a little more crowning. I know then
58 that two teams could stand there, and they had a crane to swing heavy stone on to the scows. I am familiar with section one, every foot of it; became familiar with it first in 1847 or 1848; passed over it in 1844. The road didn't run where it does now. It laid in common. The old road run by Col. Beall's house. There was a causeway and a board bridge. It was called the Green Bay and military road. The road then was south from where the road now is. I became more familiar with this section when they commenced to fence and work it; can't tell when this was. Have cut hay on this section on east side of Taycheedah Creek before the section was fenced. It was mortal big grass, blue-joint prairie grass. Have worked on section since then. Cropped on it four or five years ago, pretty near the center of section, thirty or forty acres. Put in oats and other grain. When I cut hay it was on the east line, south of the railroad, where I cropped it. There are crops on it where I cropped it then, oats and wheat, I think. I got very poor crops there then, very poor; not half a crop. The ground was wet. Water came, and my opinion is that it has been wet ever since the water has risen. I know it is three feet higher than it used to be. Draw that off and the land would be dryer. The rise of the water in the lake forces the water back in the sloughs, and naturally runs on the land, and water stagnates. The water I have seen standing on the section. Taycheedah
59 creek fills with water and sits back into the ravines that run off the section. First saw water standing on this section south of the road. I had a piece of corn, five or six acres, on south line near

creek. Water was high and drowned out my crop. Same land in wheat now. It was a wetter season than we have had for three or four years back. Since that time, or even a year ago, there could have been good crops there. It was five years ago that I raised that corn there. It has been dryer ever since, except this season. There had been north winds that year. I had some corn on land that Mr. Geisse used to own. A northeast wind drove the water up on this land. A northeast wind will raise the water two feet. Have known this to be so this year. It will drive up the water as long as the wind blows, then go back. The waves will drive up the water and keep it there. At the time I raised the corn on the south part of the section, couldn't say whether it was the high water in the lake. I laid it to that. I had oats and wheat at same time pretty near the center of the section. It was not the same season I spoke about before. The oats I had at that time were about where the railroad is now. On south side had a passable crop, perhaps 30 bushels to the acre, a small crop for that kind of oils. I cropped it a little last year, some this year. Along the road, between here and Taycheedah, have 2 acres of corn adjoining the
60 railroad. There's a strip of land, eight or ten rods wide, between railroad and cave, I have planted to corn. My other crop is north and along the gravel road, in the northwest of the cornfield. I have made measurements to determine the fact of the rise of the water in the lake. I made those measurements yesterday. Mr. J. M. Gillett and Dr. Hubbell were with me. The tree measurement we made was near where the bearing stood, near the northwest corner of section one. Also took soundings near the northeast corner of section one, and at various places near Taycheedah Creek, at mouth of the creek and near the bridge, and took some measurements at the bar at the mouth of Fond du Lac River. They were made by putting a pole down, putting my hand on the pole at the water, and then took up the pole and measured the same with tape line. There were notes taken by young Mr. Hubbell. I made the measurements and called them off to him; was very particular to get inches correctly. I couldn't give perhaps a correct statement of number of inches. Think water on the stump, by the mouth of Taycheedah Creek was 24 inches deep or thereabouts. The measurement at the stump was run down between the roots to the ground, where the bank used to be. We took soundings across the mouth of the creek. I think the water on the bar at the mouth of the Fond du Lac River was about 5½ feet.

61 By COM. Were the roots at the bottom of the tree covered with sand.

Answer. They were covered about as they would be when growing on land. I caught hold of the stump and steadied the boat while I measured around at different places a foot or a foot and a half apart. We went across on the west side where Mr. Crantz used to have a saw-mill; floated the boat across where there used to be a fountain to supply the mill with water. I think the shallowest water on the bar at the mouth of Fond Du Lac River was 5 feet or 5½ ft.; couldn't be positive. There were minutes taken, so didn't charge my memory. There were some places it would vary in depth; sometimes shallow, sometimes deep; couldn't tell what year the water commenced to rise. Had high water when the dams were put in. At the time I heard the dams were put in, the water commenced to rise; couldn't tell for how many years the water continued to rise until it got to its full height.

By COM. That year you had grain on the section you first spoke about; would ditching have dried the land?

Answer. You couldn't have ditched it; there was not enough fall to carry the water off.

By COM. In 1848, that you cut hay on this section, was the land dry?

Answer. You could drive a team around there at any time. I don't think that the land is any wetter now than then. The land was
62 wetter all around here then than now. As it is worked it will dry off; many streams that came down from the ledge have been dried up.

Cross-examined by CHAS. R. GILL:

Where Fond Du Lac now stands, in spring and fall it was under water. No such amount of land is covered with water now in the spring as in or previous to 1850. They plow the land. Have built culverts so that water will run off. The subsoil of section one is red clay; some blue clay. Water will stand on such subsoil until it evaporates. The upper soil on this section is pretty deep; from one to two feet. You can't reach the subsoil by beaming the plow on high land; presume it is so all around here. I have ploughed a good many acres on this section. I never turned up any red or blue clay. A different kind of vegetation grew in an early day from now; some wild pea-vine; in some of the low places flag grew. Wild pea-vine will grow on dry land, not on wet ground. You could see plenty of pea-vine on dry land. Blue-joint, we used to call it, grew there. In a new country, after you mow and feed the ground, the grass would change. Since this section was fenced it was kept as a pasture. They took in stock to summer there. My business through life has been farming. Since I have been in business for myself I have been farming. Never dug any wells here or witnessed any. Don't know of but one well in Taycheedah. It is about
63 eighteen feet deep. The ground there where the well is dug, is ten feet above the level of the lake. I had wheat and oats there, near the centre of section, as I have stated; had a very poor crop. We made some observation when harvesting, that if the water was down where it used to be, we would have had good crops. The crop that I had near the creek, about three or four acres was submerged. The water overflowed the banks; came up in the ravines; thought the water in the lake caused that. The creek has in dry times banks two feet high. When the lake is high, the banks are full. I have made some soundings in the lake, prior to putting in the dam. There was a steamboat get aground on the bar, and there was a week that they sent for me to help them get it off. We sounded yesterday in about a dozen or fifteen places, at or near this place. Where the spiles are now, or between the two rows, is where the channel used to be. That bar is made of sand and gravel, mostly sand. It is considerably hard. In some places we would bring up mud. When we got this boat off, we had to unload, and then dig under the boat. It was within a hundred feet from where we were yesterday; may have been right there. It was in September when that boat was there. That is the period we have the lowest water. According to my observation, there is a difference in the high water and low water, of about two feet between the fall and spring. In 1850 there was not as much difference as now
64 between the high and low water, in the spring and fall. I don't suppose there is any difference between high water and low, then and now. Taking the years together, the difference in high and low water is, about two feet. I live right there by Hamilton's mill, and I noticed that the difference was about one and one-half or two feet, at this season of the year. It is as wet now, as at any season, since I

have been here, and the ground is full of water now. Don't think there has been as wet a season since I have been here, as now. There was a time we thought we would need more water, but take the season up to to-day, and it is as wet as any we have had since my recollection. There might have been; I wouldn't say positively; we may have had floods. I was here in 1866. I have been up and down the river very often, and to Oshkosh, and about. I do not remember anything about the depth of water at the mouth of Fond-du-Lac River then. When that boat was on the bar, there was about sixteen inches of water. It would run in twenty inches of water. Very often on that bar, the steamboats of other days would grate on the bar. I should't be a competent judge about water in and around a garden, as I never owned a garden in that way. I would not, if I was going to raise grain, want a stream running through my farm; say two feet below the surface. Don't think that crops advance in such ground as fast as they would in a dry subsoil. I have never had any experience in ground,
65 so that I could say how far water would extend in a lateral direction under the ground. It would some, but cannot tell how much. Have some corn to-day at Luco Creek, and the corn is as high about two feet above the level of the lake, and the corn is as high about five rods back as on the bank of the stream. It would be perfectly adapted to corn, were it not so cold. My opinion about the hight of water in the lake is founded upon the national idea that the dam at Menasha stuck up there four or five feet will raise the water. The ground of my estimate of the height of the water is because it is higher than it was years ago. It is higher now because land I once walked over and was dry land is now under water. The measurement we made yesterday would show how much higher the water is now than then. Some of the branches or roots of that stump come up three or four inches above the ground. Don't say whether the water runs under some of the roots. I am not a tenant of Dr. Gray or Pumpelly. Years ago I took some of the land on shares. I have no lands affected by water. The character of the land bordering on the lake was: between here and Taycheedah there is marsh down to Luco Cove; beyond that it was timbered; this side, canebrakes, flags, and marsh. The marsh came within ten or fifteen rods of the Taycheedah road. Prior to 1850 the marsh extended
66 up to Scott street, in this city. Don't think that the marsh came quite up to Scott street. (Map shown witness.) The marks there are about as I remember. That land in those days was to' wet to plow. Don't know as the water extends any further up Main street now. Canebrakes used to stand there. I had no business there to call my attention to those points so as to notice anything particular about it. I had been there often; used to go fishing there some.

Redirect examination:

The steamboat lay there about a week or 6 days. Was in 1852 or 1853. They were coming up at night, I believe, but could not say. Cannot fix the year. The water was not over my knees. Could wade around there; it was not knee deep. The seasons of '73 and '74 were dryer than formerly, in fact, four or five years, dryer than usually. In 1871 it was the dryest season we have ever known here. Lake Winnebago is fed mainly by Fox and Wolf rivers. A heavy rain does not affect the lake much. A heavy snow north or off north would raise the water in this lake. A rain here does not affect the height of the water in the lake. If I had a farm three feet above the level of the lake I should not consider it as available as land six feet high. Such land is

cold and wet and grain will not advance as rapidly. When the wind is blowing from the north, it will hold these streams in check and keep the water.

By COM. You say there was one well dug at Taycheedah about eighteen feet deep, how much water was there in it?

67 Answer. I should think about five feet of water in the well.

Mr. MOORE recalled.

Recross examination:

A man can see with his naked eye that the land was nearly level, and water would not run off. I cannot make a guess as to the height of the land.

S. B. HUBBELL sworn.

I heard the testimony of above witness (Mr. Moore) read. I assisted in taking soundings yesterday referred to by Mr. Moore. I have a memorandum of the soundings made. My first minute is near a stake in the lake nearly north of the west line of section one; depth of water at that point five feet, four inches. Next measurement was at a point mentioned by Mr. Moore as being where the bearing tree stood, north and west of northwest corner of section one. Depth of water at this point five feet eight inches. That was within thirty or forty rods of the land east of the other soundings, within fifty or one hundred feet. The next measurement was on a line with west line fence a little east of north. It was an extension of the line from the fence. A little nearer the shore it was three feet deep. Made various soundings a little nearer shore. It was deeper in one spot, but three feet was about the average; some places it was two and one-half feet, sometimes three feet.

By COM. Was you as far north when you made this measurement as the other two?

68 Ans. It was no further out in the lake, further south, if anything. Next measurement was down at Taycheedah Bridge, at a large stump on the east side of the creek out in the lake. The water there was two feet three inches deep. Next measurement was made at the bridge, commencing on east side, going west 55 inches, 59 inches, 67 inches, 62 inches; these were soundings close to the bridge. Next measurement was further out in the lake next to the stump, opposite that large stump, 41 inches west of the stump. The deepest point at the bar on Taycheedah Creek, 25 inches. The measurement at the harbor bar at the mouth of the Fond du Lac River, 57 inches at its shallowest. Sounded from this side, and went over the bar, the lake was perfectly calm, a little ripple, no waves.

Cross examination:

We sounded one at the stump, one where Mr. Moore thought the corner was, and one on the line of the fence. We measured in towards the shore on the west line. The make of the bottom was sand; once he brought up mud and clay.

VALENTINE MENGEL, called as a witness by the claimants, being duly sworn, testified as follows:

I live at Taycheedah, and have since 1850. My business has been doing a good deal of work, merchandise, farming, and teaming. My store in Tay-

cheedah used to stand where Smith & Bros. had their pier, and has been there ever since Used to have it on block twenty. That is not
69 where my store is now. It is now on lots one, two, three, four, block sixteen. My store is now on block sixteen. I have occupied that store since 1856. That block is not all free from water now. In 1850, there was as nice a garden lot on block sixteen as you ever saw. Mr. Potter had a plank saw mill; I could drive behind that mill four or five rods. Mr. Smith had a fine corn-field as you ever saw just east of the creek, in 1850. In 1851 they commenced drawing logs on the plank-road. That corn-field is all washed away, and if they had not drawn the stone by the road, it would all have been washed away. They had to do this, or the whole road would have been washed away. The Gravel Road Co. done it, or rather the town compelled them to, as they took toll on the road. There was hard land there, about six acres, east of the bridge, about twenty-five or thirty rods before you struck the shore. I remember the Arimand House, and when he traded for the land. The house was washed down nine or ten years ago this fourth of July. I remember they had to leave it on the fourth of July, and that night the house went down. He had a noble house. The water undermined the house, and it went down. Mr. Geisse built a mill, the second mill, on the same place. That mill was burnt down in three years. The house went down at the time of the highwater. I have never seen the water as high as it was then. That stone-mill was built in 1855, the
70 last one. I couldn't say when the first mill was built. They got the water into the mill by digging a channel and laying a trough in it from the lake. The water was about two or three inches deep in the trough. I have examined, within the last four or five years, the depth of water above that trough, myself and Mr. Geisse measured, and it was, I think, over four feet higher than the slough above the bottom of that trough. We measured it some time in August, about four or five years ago. I have measured the water there more than once; sometimes the water fell a little; depends on the time of the year; sometimes it was not more than two feet over the box; I have seen it as high as four feet and over from top of the box. The box is as far from the mill in the lake two or three rods, to be sure, and have it reach low-water mark. These measurements were made close to the mill. I have heard them speak of that stump. I remember when it was a tree. The diameter of the tree was, I think, about sixteen inches; three feet or so from the ground. That tree, when I came here, was on dry ground; I think there must have been two feet above the level of the lake. The land was four feet higher above the level of the lake. The land was two feet higher than the water is now. The land was two feet higher than the water under the tree, and it rose more back of the tree. When I came here the tree stood two feet above the ordinary stage of the water and the land back of it four feet, but it is now
71 all washed away. I remember the garden-spot of Mr. Beall's. The water is a rod or two above that garden now. It is natural sandy soil, you know, and has not affected it as much as it would a clay soil. They had to plant some willows so as to keep the water from washing more away. I can tell you, there is a piece of land Mr. Geisse used to own, I guess it must be twenty acres, used to be tillable, nice land. You can use only about ten acres, the other ten is under water, or affected by the water so you cannot use it. It laid right south of the land Arimond owns in the lake now, and west of Beall's place. That was worth then one hundred dollars per acre.

(Counnsel for the defendant moved to strike out that portion of the testimony of the witness Mengel, which relates to the Geisse land and the damage to it by water, as not being material. The court overruled the motion, to which ruling and decision the counsel for the defendant excepted.)

There was another place near where Beall used to own. I bought seven lots there. Mr. Everdell used to own it and was called the best garden around. I own it now and I can't get on there with my teams any more. They used to raise the best garden stuff I ever saw, and now you can only raise grass on it. In my judgment the water has stood, at the lowest mark, over two feet higher than it did in 1851 and '52. The water stands longer on the land after a rise than
72 it used to. The water was never as high at any time, to my knowledge, previous to 1852, as it has been since. I mean during high water. There was no freshet or extreme high water at any time previous to 1852, to my knowledge. I noticed the variation but little in the spring, summer, or fall. I came there in September, 1850. I am now speaking of Potter's mill. That was located in block 17, right west of my lots. There was a fountain on those grounds, on one of these, artesian wells. That fountain was west of the mill. That is now covered by water. I know the Pumpelly land, section one; I know the north line of the section. There have been changes on the shore line—washed away awfully since I came there. I am acquainted with the Taycheedah Bridge; it is the same bridge that was there when the plank-road was built. It has been repaired and rebuilt. Mr. Vankuren put on some new sills. The old sills were rotten. I think it is the same height. The water has risen and it makes it look as if the bridge was lower, but it isn't. I never had anything to do with the repairs of that bridge. The piers at Taycheedah were taken out by Mr. Moore, to build a pier at Fond du Lac I think it was done in 1855, and I used to see all the stone and even some of the timber in the bottom. I took some of the stone to save my lands. You used to could see the stone and timber two feet above the water; now you cannot see any of them at low water. The water commenced to rise, I think, in 1851 and 1852 and kept rising until within three or
73 four years. The water raises, in highwater, between four and five feet above the lowest before the dam was built; that is, the ordinary stage at that time. The water piles up very high. Last Sunday, one week ago, it piled up five feet, clear over Beall's garden. It was covered even as far as to the foundation of the Gov. Beall house; covered it. A little calf was fenced in there, and it was swimming there. The calf-pen was opposite the Beall garden. I took some trees out of the Beall garden about ten inches through. There used to be nice fruit trees growing there. Hard winters killed them off. They had a top cellar at the Beall house. The water came up to that place. I have noticed standing water on section one. I did not notice it so much until I came back from California. I got hold of an old horse and went to Fond du Lac; when I came back on my way from Fond du Lac I caught a sheep's-head on that section. I guess it was in the northeast corner near Taycheedah Creek. Should judge it was about one hundred and twenty rods from the lake and one hundred rods from the east line. I have never seen water standing on that section in other parts, because I have never noticed it much.

Cross-examined by C. R. GILL.

The mill, as it was first built, was four rods from the water. It

74 was built, the first mill, before I came there. When I came, there was a trough or box running from the mill to the lake. It was sunk down in the ground, so that they could get water to the engine. It was sunk low enough so that they could get water from the lowest stage of water in the lake. That is all I know about the level of that trough with the lake, but of late years it has been four or five feet from the top of the water. I measured it with a pole. The water is close to the mill now, so it is now crumbling and some cracks in it this year. The lake was higher about three feet that Sunday than it is now. The wind from the north raised it three feet. I measured it over the box with a piece of lath, three-foot lath. Measured at one time with a stick; measured the stick with a rule. The highest we found it was between nine and ten years ago, when the water was the very highest. That box is there now. I can point it out to you if the water is clear. I have seen it when it was not two feet over the box, when Geisse and I measured it over the box the last time. I don't think it was much under water, this section one. Sometime' it was above the water a good ways. John Avery put up the mill; he was the millwright. The way the water is situated the wind would raise the water three feet, but would not do so before the dam was built. Mr. Geisse had lived in Taycheedah I don't know how long before I came there. I was not familiar with the shore of the lake to Fond du Lac. There
75 was a good many sloughs in Fond du Lac, at that time. I know where there is water now, they used to cut large grass there. I think the south part of the section is wetter now than it was then. I don't know whether land that lies 12 feet above the level of the lake would do it any good. Know that the water would not hurt land twenty feet higher than the lake. There is a great deal of it been under water that I would not give much for. Water came up in Luco Creek, and flooded the land right in the heart of the section; that does not improve the land any. If I found water on the southwest corner I would think it came from the lake, as I have seen it come there from the lake and stand there until it would burn up the grass so you couldn't get six hundred of hay on it.

Redirect examination:

I have seen persons spearing fish right on the middle of the section almost every year, not in the sloughs, between the railroad and the plank road.

WILLIAM H. HINER, being sworn, testified as follows:

I reside in the city of Fond du Lac, and have for twenty-five years. My place of business now on Arndt street, near bank of Fond du Lac River. I have been in business there 12 years, nearly. Before that time and since I have resided in Fond du Lac. From and after the summer of 1858, I have been familiar with the stage of the water in Lake
76 Winnebago. I am one of the proprietors of the foundry and machine shop. I have since 1858 given in a general way attention to the stage of water in lake Winnebago, particularly in the river, that being close by. The river is an estuary of the lake, and the river maintains, except when there is wind upon the lake, a level with the lake. My place of business is about three-quarters of a mile, perhaps a little more, from the mouth of the river. A north wind raises the water very much at times in the river, say from a foot to twenty inches at my place. I have noticed that the water in the river is raised as far up as the railroad bridge. I do not know from observation that the water in the

river is affected above the railroad bridge. Between my place and the river or at the lower railroad bridge there is quite a bend in the river, where the northern extension crosses. Just above Scott-street Bridge, in the river, from the mouth of the river, from '63 to I was familiar with the stage of the river up to Butler's slough, where Hunter's Mill now is. This was above the bend in the river. At that time I did not observe anything different than I have described. I noticed it particularly then, because I was in the lumber business. The variations were greater at that point than above, say from twenty to thirty inches. That is about half a mile from the lake. I had occasion to run large logs in the river, and have heard of their having trouble in getting a large fleet in over the bar. Don't know anything prior to 1858. The depth that a large
77 wet saw-log will sink into the water, depends on the kind of the log. Some will go about ⅓ of the diameter above the water and some ½. A wind from the south affects the water the same as a wind from the north, that is, it would lower it proportionately. The channel is from 200 to 250 ft. wide, though cannot say exactly. When the wind blows from the north the water will fill up the river and back the water in the sloughs and banks of the river. Have seen the shore between here and Taycheedah and have noticed the wearing away of the shore. This has been noticed more in the last ten years than previous. Remember once, about five years ago last May, that the water was so high at Taycheedah Bridge that my horse would not go across. I have not seen the water as high at any time since then, but have seen the effect of the flow. I know section one. I am not familiar with the land lying any considerable distance from the road, only the land lying north of the road. The rest I am not familiar with, as I have never been over it. I don't know that the settled stage of the water has changed, but my recollection is that it has, but would not testify to it as a fact. My residence now is diagonally across the street from the B. F. Moore old place; now owned by Mihills; have lived there twelve years last May. I was interested in 160 acres of land lying south of this section between section one and twelve, called the Patty place, lying immedi-
78 ately south of this section one, northwest quarter of section 12. In the present condition of section one as a whole and as it is now, I should think it would be worth from $35 to $37 per acre.

Q. What would that land be worth unaffected by the rise of water in the lake in your opinion?

I am not sufficiently informed as to the condition of this land, and could only answer the question did I know the condition of the land prior to the erection of the dam. I think the value of the land would be materially changed were there a reduction of water in the lake. The drainage is through the ravines and sloughs and artificial ditches to the lake.

Q. If the waters of the lake were to be reduced two feet or more in your judgment how would it affect the value of that land for market purposes, taking into account its configuration and variable surface and any such other facts as you are acquainted with?

A. That two feet or more is a question, rather difficult question to answer, as that "more" is a difficult data to work upon. 2 feet lowering of that water-line would improve that land materially. Three feet would be a very much greater benefit, as then the drainage of the whole section would be a feasible thing. My observation as to the influence of these northern storms upon this land I cannot make specific as I cannot state, only as I have seen it on the road. Last Thursday
79 night the storm from the north drove the water apparently over

the road. These storms must tend to increase the flow of water in these streams over that land to some extent. An increased reduction of water, say more than three feet, would be a greater benefit to the land—not very considerable, however. My idea as to the benefits to the land to be derived from a reduction of the water has been entirely upon the subject of a better drainage. Situated as that land is, adjoining to the city of Fond du Lac, a greater facility of drainage would certainly contribute to the sale of that land for other purposes than agricultural purposes in small lots. The sale of that land in parcels of less than 40 acres—say in five-acre tracts—would sell for more than in large portions; that is the east half. The west half would be better to sell in large portions. The portion north of the road would sell much better in ten-acre lots, of course.

Cross-examined:

I am not a farmer, nor had any experience in draining lands. I do not experimentally know how far apart underground drains should be. One inch to the mile will not make a brisk current in a straight ditch, nor how swift a current having a fall of one foot to the mile will run. My theory as to the necessity of three feet drainage was from observation, as I was raised on a farm, and spent the days of my minority
80 there, and I think that three feet of drainage would greatly improve that land, because the clay subsoil is a stubborn soil, and needs drainage more than that of getting below the roots of the crops. At this season of the year rain falling in a sort of a basin on top of a knoll or on high ground, the water would evaporate instead of running off. In regard to the testing of my idea as to drainage, I have never had any experience; it is a mere matter of judgment. I have a well on my place, an artesian well, at my house, and a bored well at my barn. It is forty-two feet. The water comes up to within four feet of the surface, struck it in the seam between the red and blue clay, the character of the lake shore along the south line of this lake. When I came here, about the 10th of June, I went down to where I now live, and the prairie was all wet; grass covered the prairie, and there was no drainage. I did not observe any change in the waters of the lake prior to 1858. Strong & Bradley commenced work on the railroad in 1852. I think it was in July that they broke ground down here by the old Fond du Lac House. I think there have been evidences of the kind that would show that the water, at its average stage, has been higher from year to year in the last twelve or thirteen years; not so much overflow on the land as formerly, as there has been a good deal of filling up, and the water has been more confined. My impression is that the range between high and low-water mark is not so much now as it was in 1863 to 1868.
81 When I came here there was a slough this side of place where I now reside. I never was north of the place I now reside until 1862. Think there was not any settlement north of where I now live. Much of that was covered by deep water. That kind of ground was in sight as far east as Luco Creek; then there was what appeared to be forest, and west to what we call the bay the other side of Fond du Lac River. The value of naked lands three miles south of the Patty House I am not acquainted with, as I have not dealt in lands so as to know their real value.

By COM.:

At what time was the land north of Scott street in the condition you state, was it previous to 1852?

A. I never was there but once in 1852, nor again until I went to live

there. The change in lake shore I have noticed by driving along there. There was a line of cat-tails, as they are called, running in a slough across the road where the wagon shop now is, and down then to the lake. There were some oak trees, however, east of this slough; beyond the slough there was high ground.

FRANK TAYLOR called as a witness, who, being duly sworn, testified as follows:

I live here in the city. I am a real-estate broker. I am familiar with the value of real estate in and around this city. My transactions in real estate have been somewhat considerable since I have been in business here. Farming lands within one, two, or three miles of this
82 city run from $50 to $150 per acre. The higher priced lands are on Forest street, west and south of the city—elevated lands. I sold a piece for Mr. Foster on Forest street for $150 per acre. It was five acres; a mile and a half west from Main street, outside city limits. No improvements on land but fences. That sale was year ago this spring. I sold for Mr. Hunter ten acres for $1,250, a little further out. The line this way was twenty rods further out than the other. That sale was about a year ago now. It was fenced; that was all the improvements. I sold another ten-acre lot for a man in Chilton for $125 per acre about two and a half miles out; no improvements, not even a fence. I don't know of ever having sold any large farms out that way, as they are all cut up in small farms. Have sold some on the Milwaukee road. Sold 61⅓ acres to one party; 40⅔ to another, and 80 to another. The 80 was sold at $50 per acre; that was about three miles from here. It was the land marked J. Wolf, on the county map, southwest of southwest of 27, northwest of northwest of 34, unimproved, without road. The south half of the southeast of 27, marked J. Mackley, on map, was sold at $75; it had been plowed; no fences. Wolf's was made one year ago; Mackley's two years ago. Warner bought of the Drury farm a quarter-section at $75 per acre. That is beyond the Seven-mile House; that is southwest from here, about five miles. There were 30 acres sold off from the J. S. McDonald
83 farm for $5,000. There is a small house on it, and a good barn; it is just outside of city limits, part of sections 23 and 14; that sale was made two years ago. Alex. McDonald to Benjamin Nightingale, northwest corner of 14, sold for $125 per acre, a little more than a year ago. There was a small house and barn on it. Hunter to Nightingale, 30 acres at, I am not certain, whether $175 or $180 per acre, a barn on it, no house. I sold for Mr. Boardman, 46 acres for $76.50 per acre, unimproved, for pasture to a Mr. Wright. It was lowish land half a mile east from city limits. I was offered $100 per acre for east half southeast quarter of 23; it was declined. The part across the road without buildings, about 30 acres was sold for $100 per acre. The southeast quarter 29 except two acres, I sold for $65 per acre about two years ago; house and barn on it. The northwest quarter of southwest quarter of 17, I sold this spring at $60 per acre; the improvements are not worth $100, fence and all; about three miles out. I have had the Pumpelly land in charge for sale for about two years. I have not sold any yet. I have made some endeavors to sell it. I have had some offers. Mr. Pier and Mr. Galloway offered $37.50 per acre, about one year ago. The highest price in cash and paper offer that I have received, was that $37.50 per acre. From my knowledge of real estate, the market value of that land is $40 per acre, and I have offered it to Mr.
84 Hiner for that sum, also to Mr. Pier and Galloway. I couldn't

get it. Mr. Baldwin of Chilton, wanted to buy it and offered part cash and part pine-land. I have been on that section. They didn't consider the land worth that, because of moisture in the land. Mr. Hiner wanted it as a stock farm. I am speaking of it as whole, as there are few who are able to buy it. The men I am speaking of, are able to buy.

Cross-examined:

I have lived here three years. The star of empire takes a start sometimes one way and sometimes another. Cannot tell where the first improvements were made, as I did not know the place then. The city has not necessarily increased, as it has increased in size in the last twenty-five years; must go south. Property one mile *north* is worth more than land one mile north. Naked land for farming purposes at a distance of three miles from the Patty House, to be used strictly for agricultural purposes; there are farms within that distance that cannot be bought for $200 per acre. For two and a half miles out, land is worth $90 to $100 per acre on the average. I have talked with three or four about the Pumpelly tract in parcels. I am somewhat acquainted with that tract. The southwest quarter of that tract as it is, is worth $60 per acre. I would not put it at $100 per acre, because first-class men will not go there and have desirable neighbors. I know that a one-half interest in that tract has *not* been sold for $100 per acre to Dr. Gray; he bought also the claim
85 for past damages. He turned in some houses and lots that I have sold for less than one-half what he got them for. Dr. Gray has taken me out there and told me to sell the land for $40 per acre. Railroad cutting through that section does not affect the land. The land is not dry; water was standing on it some last week from the ravine that runs up from Taycheedah; I supposed it was water backed up from the lake. I would pay for 1,000 acres of land, were I able to buy, and take my pick, $100 per acre, within three miles of the Patty House. My commission, at two and a half per cent., has amounted to $200. We have sold a quarter section and a forty. Our business is mostly city property. I have sold over 200 acres of farming lands per month in the last year.

Claimants called as witness E. CONE, who, being sworn, testified as follows:

I am a brother-in-law of Mr. Pumpelly. My business in early years was farming up to 18; then was studying. In '61, '2, and '3 was in the Army, and was in government employ during the war, teaching school, and after that farming. I first had to do with the cultivation of the Pumpelly land in '66. I was on that part of it south of wagon-road and west of the creek. I put in some crops. I sowed some 75 or 80 acres of flax for the flax-mill and 25 acres of rape for myself. I broke part of the
86 ground, or my teams did. I sowed that flax-seed on the ground where grain is now. It is scattered along to where the new road is now, across the section east and west. There is one road north and south across the section. I did not cultivate any more of that section in 1866. The ground was wet. We began breaking from about the 10th to the 15th of May. We went around with six mules, trying to break about six inches deep, and when we came around the second time the furrow would be filled with water. The crops were a failure on account of wetness of soil. Most of my rape-seed drowned out. I got 65 or 67 bush-

els to 25 acres. The flax grew about sixteen inches high; was partially ruined in the furrow, and totally spoiled in stack, and it was used for fuel. On the other side Mr. White had forty acres under the plow, and the lake shore for pasture and meadow, and where he was, there was some meadow and pasture. It was east of the creek, and was east part of the section. It was a piece about twice as long as it is wide, and near what we call the ditch. On the east line, near center of section, White raised very poor crops; it was wet. The horses would mire during the whole season. A large part of that ploughed land was wet that year. That section was very wet in the spring, up to the middle of June, when we quit putting in crops. I next had to do with that section in '67 and '68. In '67 the higher parts of that land south of Taycheedah road, the June grass-knolls were dry, and we had fair crops on high grounds, and the low was poor. There was a half
87 difference in crops, 20 bushels on high and 10 bushels on low; this was in 1868. Raised about 12 or 12½ acres of best wheat; think there was 20. I farmed about 90 acres under the plow; about one-third to wheat, 20 of good and 10 of poor; the balance of sixty acres was to oats and barley, about thirty acres each. Ten acres of my barley went thirty bushels per acre, and twenty went fifteen. There was about 600 bushels barley; oats about the same. The crop was about one-half different in high and low ground. Mr. White cultivated some land that year; his crops were very poor; the section was some dryer than the year before; it was better then than I have ever seen it since. Some of that land was flooded in 1866. There were two courses that the water left the lake up Taycheedah Creek across the section & near a sand ridge, across perhaps 60 or 70 rods, up Luco Creek; so, with an exception of twenty or thirty rods, there was a continuous line of water across the section; and another the same way up, further on Taycheedah Creek, there was a considerable amount of overflow. Don't remember in 1867. I came from St. Louis with some mules in May, 1866; remained over night, and went down the next day, and have kept this in my mind from that fact. Have seen it overflowed at other times, and had frequently to drive through the water, which would make my horses' heads swim; this was a frequent occurrence in the sea-
88 sons of '66, '67, and '68. In 1868 I farmed the same part of section; the land was pretty wet that year. I can fix that because I had a fine team of mares, and I didn't work them on the harrows, as I would not put them in the mud up to their bellies. I got 750 bushels of wheat that year on 45 acres, and 1,600 bushels of oats on 45 acres. The wheat shrunk very much. Sold the wheat to Mr. Tibbits for $1.17 per bushel. I never could get an offer on the street. Mr. White raised wheat and oats that year; his crops were poor in quality and quantity. I have been familiar with that section since, and have cropped it this year. From '68 until now I have been to Taycheedah frequently, and have had stock in the pasture from time to time. One year I cut hay, and one I bought hay right from the mower. The hay production there has been small and light, five hundred to one-half ton and one ton to the acre. The southeast part of it has a large growth of coarse grass. Since I have known that section I have not known a full crop of grain or grass. I attribute the want of full crops to lack of drainage. My first acquaintance with that land was in 1866. Now, so far as I know, that is a vegetable deposit and a clay subsoil. Have not examined over all this section; it is a very free vegetable mold and clay subsoil. Think I have struck the subsoil in the lower lands; our breaking plow would turn up the subsoil in low ground. When free from water it is

a rich soil. I have had on the lake shore a little transaction in
89 real estate where the shingle mill is moved up and made into a house. I bought it for $300, made some improvements on it, and sold it for $400. I know of changes on the shore line. Where I bought, more than half I sold is washed away. It was originally 6 acres, and now there is not one. There were two or three acres when I bought, and now there is not one. So far as I know the shore, I don't know anything to prevent the inroad of the water on that land. I do not know the north line of this section, except that it is sandy. I know that the north line of the shore is working inland.

Cross-examined by C. R. GILL:

The year I raised the 750 bushels of wheat it all shrunk, and sold it for $1.17 per bushel. I raised it on that part of the section west of Taycheedah Creek. The whole wheat was not shrunk alike; we had some fair wheat; hazel-bush and June grass knolls were good. Never have seen a full crop of grain or grass on that section. Where water stands on the surface it will come into furrows, but here the water was not standing. After a heavy rain in some times of the year the water might be drained off; in some parts of the section it could be drained at all times of the year. There has been a ditch dug from the northeast corner to Taycheedah Creek. Have no means of knowing of any other shrunk wheat. Cropped this ground in '66, '67, 68, and
90 this year. I don't think that I expected a full crop in consideration of the nature of the soil. I was to get one-half net profits; there was nothing left to divide. Planted it 22d May. We work very hard when we can get to it. The survey of the land would not probably show it the highest on the section. The object of taking that was because it was the only piece of land that was fenced. There has been a good crop on some of the lands now under crop near the Luco Creek; should judge we have 25 acres of corn there. My field of corn is near Luco Creek; the whole of it is between the railroad and the wagon-road; some potatoes, some grass in this lot of forty acres. My wheat was raised that year in here, about the north half of the southwest quarter. The point where the furrows filled was south of the railroad, on west half of the section. Where the mules went in up to their bellies, cannot point to the exact spot. It was south of the center of the section that it was the muddiest. The worst portion was near the south part of the center of the section. The oat ground was still worse than the wheat. My crop of rape was planted in different places around the section. There was no mire anywhere when I put in the rape-seed. It was all the way in various patches from the Taycheedah road to the south part of the section in the central part.

Redirect:

I have seen fishing on that section south of Taycheedah plank-road;
think they were to the middle of the section from Taycheedah,
91 past the quarter-line of the section. The water was standing from Taycheedah up to where I have seen them fish. They were fishing in boats; it was a calculation to fish there every year. I have recently noticed the effect of water on this section from the wind in the lake. I didn't see the water, but saw its tracks. The land was covered from the depression of Luco Creek about two feet above the roots of the grass in the bottom of the ravine. The roots of the corn were covered with debris from the mill, bark, etc. The effect of the wind from the north on Taycheedah Creek sets the water back; have seen the debris on the section, sixty rods back on the section. One of my

plank' that I carried there to make a bridge has been carried back about that distance.

Claimants called as a witness JOHN SEWELL who, being sworn, testified as follows:

I have lived in Fond du Lac since '49. From 1849, when I first knew the lake, until this time, the water is higher now than then. In 1849 to 1850, I walked all through the swamp back of Frank Moore's house, except over the slough, where I walked on a board. It was all dry but that; I had just come into this country, and that had no fences. The highway was through that, and I thought it quite a desirable place. One place near Luco Creek, where some trees were growing, I took quite a fancy to, and another gentleman and myself had a notion to buy that land, and I was careful to look at the shore. Gov.
92 Tallmadge had entered that land for some man east, and kept quite a look-out on that piece, and in course of time we saw the shore changed. It kept changing clear down to Taycheedah, and we quit all notion of liking that portion of country, as we did not know where it would stop. The whole land there appeared, in the veins of the land, to be more wet. I never examined to see whether it was the creeks there, but the whole land seemed to be affected, and we didn't think the land good to purchase. There was always an attraction on that land, as it was a quick, sandy soil, sort of loam on each side of the road. I purchased a tract of land near to this on section 11, sort of corners on this land. I bought of Ransom's partner; bought undivided and divided interest. I owned something over one hundred acres, two 40, s., 15, and 10. I can't recollect what year it was. It was at the time of the sale of section 11 in the partition suit. Bought it, I think, in 1850. My observations were mere general observations. I looked at the land on the surface. I did not measure how far the lake went up; just took it from general observation. I usually kept stock on that section, and this took me all over it, and I thought the water made it a wetter section. I pastured there after they put their first fence on there. Don't remember the time since they have had their fence there, that I have not had a fence there. I have seen the section under water, and I made no point on it, because I thought the whole thing was given up to water. I have no means of measurements as to how high the
93 water has risen; only state it has risen. I heard that they were building the dams at Menasha; heard a great deal of talk about it. This increase of water has happened since the dams were built. I have been familiar with the growth of Fond du Lac and improvement of country about here. Have owned farms around here; owned one in section 24, one in section 11. I could come to my opinion as to the value of the land to state what I would give for that land without the water. I really think that the property would be worth as much more to-day as it is if it was not for the water, for town purposes, small residences, etc.

Cross-examined by Mr. GILL:

I have no lands that I claim to be injured by the water. I do not think that I formed an opinion as to the damage of the water before I sold my land. I am a merchant; own some outside property; farming land. If the land was dryer—that is, the general overflow has spoiled the character of the land—if the land were dry it could be sold for residences, but it would injure the land for agricultural purposes. I have not been a farmer; would not be called a practical farmer. I don't wan't to guess how many feet the water has been raised. I can see the

water as it runs when backed up in the wet places. I would like to answer that by saying that the land is spoiled for agricultural purposes.

My farm, with house and buildings is worth $100 per acre. When
94 I first came here I walked all through the swamp by Frank Moore's house, from east to west. I went over there dry shod. There was some very high, coarse grass there; may have been some reeds there; there was a slough there. I don't recollect of wading any. I now recollect I had an interest in some lands lying on the river; did not go over my boots in the water. If there were any places that were soft I would look for a hard place before I would step. I couldn't say that there was or was not any cat-tails there. Why I remember it was that I expected to get wet in going across there and didn't, the water—I couldn't tell when it stopped rising—just as the seasons would go, the water has been higher than before. After '50 or 52, the rise commenced, and some periods it seemed to be much higher. Beyond Luco Creek I looked at lands for building purposes. That Sunday, when I went over beyond Moore's house, I went to see some land I had talked of buying that fronted on the river. From there I went East. This was in the summer time. My land that I have now is over east of here, section 11, and the others are more in lots; some on the east, and some on the west side. That section (one) is worth between forty and fifty dollars per acre—perhaps forty. I don't know much of anything about drainage. I haven't thought of that thing in reference to this land. If the level of the engineer would show that nine-tenths of that land was four feet above the level of the lake, I would want some experience
95 in the matter before I could answer that if the lake came up and flooded the land I should think the land was damaged. I should not want any land that was flowed at any time by water.

By Com. If that land had actual drainage four of feet, would that effect the value of the land one-half?

Ans. The wind does raise that water, sometimes, over farms four feet. I do not think this that I have testified to is a mere wild guess. I couldn't say that all persons would make as much difference as I. It is injured for any and all purposes; coarser grass will grow there than it would were it dryer.

Redirect:

My observation is that a wind from the north will drive the water up into the veins of the land and submerge the land. I have noticed that this would do so.

J. W. Whinfield, called as a witness for the claimants, testified as follows:

I came to Fon du Lac in 1847; I first resided down in Taycheedah; I lived close by the lake shore; I did not at that time own property there; I went from there on a farm on the ledge for three years; was constantly at Taycheedah; went down there after that and lived there for fourteen years; part of my present residence is on block ten; I live at the corner of N street and Calumet road; I don't do anything at all, I believe; simply amusement; I am a civil engineer; I amuse
96 myself with a brewery sometimes; I first settled in Taycheedah in 1847; I remained there while I was building a house on the ledge; I bought my property on the lake shore three years after I came; built the brewery in or about 1855; may have been before; I was familiar with the lake shore; a great many changes have taken place; at Taycheedah Creek there was a very pleasant walk up the

side of the creek; I have walked up there many times; it was an unpleasant creek to cross as the creek was muddy; the banks were perfectly dry, then, towards the mouth of the creek; the Manchester used to come to a willow tree within a quarter of a mile of the present bridge, on the north of the bridge, or north of the creek; there were seven acres of land north of the creek that were carried off, in fact; the willow tree stood on the bank of the creek about one-quarter mile from the present bridge; it did not stand quite out to the outer edge of the shore; we walked down to this tree on the bank; there were a great many bushes along there; the willow tree was noticeable because the steamboat used to tie up there; the bank of that stream was in parts four feet high, and some places low and wet; some were perfectly dry; that bank was of the usual character of the country; I know a great many changes along the shore; I have seen houses there and washed away; mills built there and swept away; I saw Arimond
97 building a house there; it was washed away, and some of the brick are there now, under water; it might have been about 16 years ago; the lake had risen before Arimond built his house; the water commenced to rise; the first time I was at Menasha, I was appointed one of a committee to see what made the water rise; I cannot say when the water commenced to raise; it commenced to rise immediately after the dams were built; there was no general rise before the dams were built; it was a continual rise of water every year; the water has been at least three feet higher ever since the dam has been built.

By COM. Do you mean that it is continually rising, or has it reached a certain hight and remained there?

A. That is what I mean; it has reached three feet higher than before the dams were built and remained there. It got as high in one year as it has been since. Any tightening of the dam or change in hight of the dam would raise the water correspondingly. The highest I have ever known was five years ago. From various causes I call the rise three feet; from one, there was a fountain considerably above the level of the lake, and a mill; where they were is now all water. This was Potter's mill. This was between Mengel's and the bridge. It stood about not less than 2 feet above the water, and it is now 18 inches
98 below the level of the lake. The Geisse mill, I saw the first foundation for this mill; there was quite a bank outside of the mill, and a swamp outside of that; outside of that a large amount of cane; all that is under water and the bank has been some washed away and more would have been, but for stone I put in there. The water standing on the swamp for the depth of three feet shows that the water has raised that amount. I have not measured the hight of the water over these places. Trees, three rows of them, I planted on my property, two rows of them are gone. The water has encroached on my ground, foreshow included, about fourteen rods. The Smith pier was somewhere about where Mengel's store is. It was built longer than wide, and made of crib stone; went a long ways into the lake. I put a bathing-house on two stone piers. That was washed away, and the way that lead to it; all that has been washed away. The stone was up to the top of the water; it was built before the dam was made. When the cribs were washed away the stones fell down.

Cross-examined by C. R. GILL:

From absolute knowledge, I date my idea of three feet rise of water in the lake. The fountain was about two feet above the level of the

lake; might miss a tenth of an inch, might a sixteenth. I have not measured the depth of water over that fountain; I have waded near it. In the spring it is about from six to eight inches differnece between high and low water in spring and summer. It was not so before
99 the dams were made, because the ice would not freeze so thick and the outflow was more. Sometimes the north winds affect the waves (the winds and waves would not affect the shore.) The waves are larger now than they used to be. The wind blows stronger now than it used to before the timber and trees were cut away.

E. C. GRAY, called as a witness in behalf of claimants, being sworn, testified as follows:

I paid for the Pumpelly tract $40 per acre. We called it $50, but it was what I would call $40 in cash; traded some city property, putting in the property that I traded at cash prices put the land down to $40. Made the contract for the purchase in July, 1873. Pumpelly had not got the deed for the land as yet, so we made a contract. Got the deed in September same year. I paid about $8,000 in money and first-class mortgages, balance in city property. I used houses and lots in the city limits for the trade. Traded a house and lot on Second street near Mil. street. We called that $3,500; it has been since sold by Pumpelly for, I think, about $2,000; can't tell exactly. Another house and lot on Division street at $1,500. That has been since sold by Pumpelly. Don't know what price; quite a little less than he paid for it. A house and three acres of land on Seymour street at $1,800. That has been sold by Pumpelly for $700. That was all the
100 property that I paid or gave in trade. There was also in the contract that I was to have half of the damages to the land; that is, all the damages that had been or might be sustained. My land has been in the hands of Taylor and Smeed for sale; have spoken to others about it at $40 per acre; have not been able to make a sale.

By COM. How many acres did you estimate in the section when you bought?

Ans. About 263 acres, I think, that I bought.

The contract for the purchase of the land identified and offered as evidence. Dated 21st July, 1873.

Cross-examination:

Made a contract for this land in July, '73; got a deed in September, 1873.

LEVI HUBBELL, called as a witness for the claimants, being duly sworn, testified as follows:

I am a brother-in-law by marriage of James K. Pumpelly. I am acquainted with the family of James K. Pumpelly. His father's name was George James Pumpelly; George J. Pumpelly he signed his name. I have known the family quite intimately since 1836. George J. Pumpelly is dead. George J. Pumpelly died, I think, three years ago in May. He left surviving him five children. Their names were James K., Charles, George, one they called Collins, and Mary. She is not married unless very recently. I saw her a year ago last March,
101 and she said she was then of age; 22 or 24 years of age. He left no wife. I never heard of any other member of the family than I have named.

CHAS. E. SHEPARD, called as a witnesss for the claimants, being sworn, testified as follows:

I have acted as the attorney for Dr. Gray and Mr. Pumpelly in examining the title to the lands in question and drawing the papers. I have offered here in evidence three deeds from three of the heirs of George C. Pumpelly, deceased, to James K. Pumpelly, and the deed from James K. Pumpelly and wife to E. J. Gray. I ascertained the heirs of George J. Pumpelly in this way: I personally knew but one. I don't know as I ever point-blank asked Pumpelly if he had any other brothers and sisters than the four named, but on the talk of sale to Gray there was talk constantly about fifth-interests in land. He would (Pumpelly) talk about the four that have been named, and I have never heard the names of any other mentioned. I had, as notary public, something to do with the transfer of lands in New York by the heirs of the deceased Mr. Pumpelly, who were residing in Wisconsin. I think a few months after Mr. Pumpelly came back here, Jones, administrator, commenced to send on deeds to be acknowledged by James. I have taken a good many such. These deeds
102 generally recited that they were executed by the five heirs, naming them and their wives, as heirs at law of George J. Pumpelly, deceased, and that they were executed in pursuance of a contract made by the deceased in his lifetime. There were never any names mentioned, only those that are named here. They were joint-deeds of the five as heirs, they all said, after giving their names—heirs at law of George J. Pumpelly. Some of these deeds would sometimes be executed by James first, and sometimes by others first. I have seen a good many papers executed by the heirs of the deceased, but never saw any other names as heirs.

BREESE J. STEVENS, being duly sworn, says:

I am vice-president and acting president of the Green Bay and Mississippi Canal Company, and have been for a number of years. I was attorney for the trustees of the Fox and Wisconsin River Improvement Company. The Fox and Wisconsin Improvement Company was organized in 1853. That company was the owner and in possession of the improvement along the line of the Fox and Wisconsin rivers, including the Menasha dam and canal, not including the water not required for purposes of navigation. That company derived its title from the State of Wisconsin. The State, by its board of public works, had commenced this improvement, and under a contract made with the board of public works the Menasha dam was completed. The State conveyed to the improvement company, July the 6th, 1853.
103 The Fox and Wisconsin Improvement Company executed a deed of trust to certain trustees to secure certain indebtedness, and an issue of bonds upon the works of improvement and the lands granted by Congress. In 1865 a decree, in the nature of a decree of foreclosure, based upon said deed of trust, was made by the circuit court of Fond du Lac County. In 1866 a sale was had under this decree, and the purchasers were organized into the Green Bay and Mississippi Canal Company, under a law of the State of Wisconsin passed in 1861. The certificate of incorporation was filed August 10th, 1866, and the deed to the company issued within a month or so thereafter. This deed covered the works of improvement. On the 22d day of August, 1867, George J. Pumpelly commenced an action against the canal company in the U. S. circuit court for the then district of Wisconsin for the recovery of damages alleged to be occasioned

by the Menasha dam to section 1, town. 15, range 17, Fond du Lac County. On the 25th day of June, 1874, Frank L. Jones, as administrator of George J. Pumpelly, deceased, commenced a subsequent action in the U. S. court for the eastern district of Wisconsin against the canal company, to recover damages to the same land, occasioned by the same dam, for the six years next prior to said action. In the first suit the claim was for damages for the six years next preceding the
104 commencement of that action. The first action was revived in the name of Frank L. Jones, administrator, and both actions are still pending, unless abated by operation of law. In those actions I appeared and plead as attorney for the defendant. Under an act of Congress passed in 1870 the Canal Company made an agreement for the sale of the works of improvement of the canal company to the United States. The agreement was made October, 1870. The consideration was fixed by an award made November 15, '71, and the deed was dated and delivered about September 18, 1872, and possession delivered to the United States immediately thereafter.

The plaintiffs then called as a witness on their part JAMES K. PUMPELLY, who, upon being duly sworn, testified as follows:

Q. Was George J. Pumpelly your father?
A. Yes, sir.
Q. Do you remember when he died?
A. He died four years ago.
Q. How many children did he leave?
A. Five.
Q. What are their names?
A. Mine, the name of the eldest, James, Charles F., Collings——
Q. Give Collings' full name.
A. Josiah Collings, George B., and Mary S.
105 Were they the only children of George J. Pumpelly?
A. Yes, sir.
Q. They were all living at the time of his death?
The pl[illegible] A. Yes, sir.
sworn, [illegible]

Plaintiff then called as a witness, C. L. PIERCE, who, being duly sworn, testified as follows:

Q. [illegible]
A. Direct examination by Mr. GILLETT.
Q. Are you the register of deeds of the county of Fond du Lac?
[illegible]er Yes, sir.
A. Are these volumes here lying on the table records of your office?
p[illegible] A. Yes, sir.

Counsel for plaintiff offered in evidence the record of a patent from the United States of America to Theresa Pauquette, dated May 18th, 1849, recorded June, 30th, 1852, 2 o'clock, p. m., in volume 1, of patents page 48, section 1, 15, 17 east.

Also, offered in evidence, record of a warranty deed from Theresa Brisbois, whose maiden name was Theresa Pauquette, and her husband, to H. L. Dousman, dated March 18th, 1851, recorded the 24th of April, 1851, in volume 2, page 80, conveying the equal undivided half of section 1, 15, 17.

Also, offered in evidence, record of a warranty deed from Theresa Brisbois, and her husband, Mark D. Brisbois, to H. L. Dousman, dated September 22, 1851, recorded Oct. 27th, 1851, volume P of deeds,

page 427, conveying an undivided half of section 1, 15, 17 east.

106 Also, offered in evidence, the record of a warranty deed from H. L. Dousman and wife, to George J. Pumpelly, dated June 5th, 1852, recorded August 2d. 1852, volume R of deeds, page 464, conveying section 1, 15. 17.

Also, offered in evidence, a quitclaim deed from Josiah Collins Pumpelly, to James K. Pumpelly, dated 21st of August. 1873, recorded the 13th of September, 1873, volume 71 of deeds, page 179, conveying an equal undivided one-fifth, of section 1, 15, 17.

Also, offered in evidence, a quitclaim deed from George B. Pumpelly to James K. Pumpelly, dated 23d of August, 1873, recorded Sept. 13th, 1873, volume 71 of deeds, page 181, conveying an undivided one-fifth of section 1, 15, 17.

Also offered in evidence, a quitclaim deed from Charles F. Pumpelly to James K. Pumpelly, dated 21st August, 1873, recorded November 28th, 1873, volume 71 of deeds, page 315, conveying an undivided one-fifth of section 1, 15, 17.

(Counsel for defendent objected to the deed from Josiah Collings Pumpelly to James K. Pumpelly, upon the ground that the certificate of the clerk of the court does not show that this deed was executed according to the laws of the State of New York,

Also objected to the deeds that there are no witnesses to the deeds.)

107 The plaintiff then recalled as a witness, J. K. PUMPELLY who testified as follows:

Direct examination by Mr. GILLET.

Q. Look at the signature of that instrument objected to, the Collings Pumpelly deed. State whether you know his handwriting.

A. I know his handwriting.

Q. Are you entirely familiar with his handwriting?

A. Perfectly so.

Q. He is a brother of yours?

A. He is a brother of mine.

Q. In whose handwriting is that instrument executed? [illegible]nature,

(Objected to.) [illegible]ork to

Counsel for plaintiff proposed to show that it is a genuine sig[illegible] and then offer in evidence the statutes of the State of New Y[illegible] show what is necessary to execute a deed.

COURT. I will take it subject to objection and exception. [illegible]laim

Counsel for plaintiff offered in evidence the record of a quit-c[illegible]13, deed from Mary S. Pumpelly to James K. Pumpelly, dated 21st of [illegible]gust, 1873, recorded November 28, 1873, volume 71 of deeds, page 3[illegible] conveying an equal undivided one-fifth of section 1, 15, 17.

(Objected to for two reasons, first, because there is no consideration expressed in the deed; second, because the record is mutilated.

108 Objection overruled, to which defendant excepted.)

Also offered in evidence an assignment from Frank L. Jones, administrator, from George J. Pumpelly, Josiah Callings Pumpelly, Mary S. Pumpelly, and Charles F. Pumpelly to James K. Pumpelly, of all right, title, and interest in their claim for damages for the flowing of these lands, dated day of September, 1873, marked Ex. 4.

(Objected to for the reason that a claim for damages against the United States is not assignable; cannot be assigned by any of these parties. 2d, for the reason that this instrument bears no date, and is not recorded. 3d, it has no subscribing witnesses.

(Objection overruled, to which defendant excepted.)

The following is the assignment of damages received in evidence under objection and exception, and above referred to:

Know all men by these presents, that, whereas, in the lifetime of George J. Pumpelly, deceased, he was the owner of a certain piece or tract of land known and described as section one, in township number fifteen north, of range number seventeen east, in the county of Fond du Lac, and State of Wisconsin, and lying adjacent to the Lake Winnebago, and which said land was damaged from the flooding and flowing of the waters of said lake, caused, as was alleged, by the erection and maintenance of a certain dam across one of the outlets of said lake, by the Green Bay and Mississippi Canal Company, and for the
109 recovery of said damages said George J. Pumpelly did institute an action in his own name against said canal company in the nited States circuit court for the eastern district of Wisconsin, and which suit has abated by the death of the said George J. Pumpelly, and can now be carried on and prosecuted in the name of the administrator of the estate of the said George J. Pumpelly; and whereas the undersigned have conveyed their several interests in said land to James K. Pumpelly, one of the heirs-at-law of the said George J. Pumpelly, who proposes to carry on the said litigation at his own expense, and proposes to and has indemnified the undersigned as against all costs, charges, and expenses that might otherwise be chargeable to us or either of us by reason of such litigation:

Now, therefore, we, Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, Mary S. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and Josiah Collins Pumpelly, heirs-at-law of the said George J. Pumpelly, deceased, do, upon the consideration aforesaid, and upon the further consideration of one dollar to us in hand paid, hereby sell, transfer, and assign to the said James K. Pumpelly, all our respective rights, interests, claims, and demands against the said Green Bay and Mississippi Canal Company, its grantors and assigns against any and all persons or corporations which had
110 accrued to the said George J. Pumpelly in his lifetime, and to which we or either of us as his legal representatives would be entitled for or on account of the damages which had been occasioned to the said lands, and to each and every part thereof, by the flowing and flooding of the same, and to any and all judgments or recoveries that may be had in said action, or which may be obtained by negotiation or otherwise.

And we do hereby authorize and empower the said James K. Pumpelly to receive and hold for his own use and benefit any such damages as may be recovered in said litigation or otherwise, he, the said James K. Pumpelly, paying and discharging all the costs and expenses that may have been or may hereafter be incurred therein.

In witness whereof we have hereto set our hands and seals this day of September, A. D. 1873.

In presence of—

FRANK L. JONES, *Adm'r.*	[SEAL.]
GEO. B. PUMPELLY.	[SEAL.]
JOSIAH COLLINS PUMPELLY.	[SEAL.]
M. S. PUMPELLY.	[SEAL.]
C. F. PUMPELLY.	[SEAL.]

Also offered in evidence the record of a warranty deed from James

K. Pumpelly and wife to Edwin C. Gray, dated 6th of September,
111 1873, conveying an equal undivided half of this section 1, 15, 17, recorded September 9th, 1873, volume 66, page 286, excepting a strip 130 feet wide, through section one on the line of the Sheboygan and Fond du Lac Railroad, about sixteen acres, which was awarded to the railroad company May 1st, 1864, judgment docketed January 29th, 1871; excepting therefrom south half of southwest quarter of southwest quarter of said section conveyed to Benjamin Nightingale, making 20 acres that was conveyed to Bessie Pumpelly, and by her conveyed to Benjamin Nightingale, except that part of the northeast quarter of the northeast quarter of said section lying north of the Fond du Lac and Taycheedah Road; also excepting about two acres contracted in parcels to one Fountain and one Dunn, respectively; also excepting a strip of land across said section occupied by the Sheboygan and Fond du Lac Railroad.

Also, offered in evidence letters of administration showing that this Jones was the administrator of George J. Pumpelly, deceased.

The plaintiff then called as a witness JAMES MOORE, who, being duly sworn, testified as follows:

Direct examination by Mr. GILLET:

Q. You are living near this land, are you not—section one?

A. Yes, sir.

Q. The Pumpelly lands?

112 A. Yes, sir.

Q. How near?

A. I live within less than a quarter of a mile.

Q. You are pretty familiar, are you, with their condition?

A. I am; yes, sir.

Q. Now, since you were sworn before the commissioners, will you state what has been the condition of those lands in respect to the water upon it?

(Defendant objected to any evidence being given as to the condition of these lands subsequent to the filing of their petition.

Objection overruled; to which defendant excepted.)

Q. State what has been the condition of these lands in respect to flowage the last year?

A. Well, as far as that is concerned, the water is higher this last year than it has been for years back, and there is a portion of that land has been flooded with water, so they could not—land that they formerly plowed couldn't be plowed.

Q. What part of the section was that on?

A. Well, there is somewhere from near the center of the section. They had a piece of potatoes planted by the side of the railroad, that I passed there frequently, that I noticed them covered with water, a good deal of water standing on them, so they could not do much with them. I guess pretty much a failure of the crop. Those potatoes are very near the center of the section, I should think.

113 Q. Any other portions of that land that you have noticed, especially as to being affected this year by water, that had not been before?

A. Well, I have not been over the land as much this year as usual. I have formerly occupied some little portion of it every year until this year, I have not. Still I live close by; I have been past it often.

Q. What have you noticed in respect to the crops on the section this year?

A. The crop is very poor; a light crop.

Q. Has there been some plowing done there this fall, or attempted to be done?

A. Plowing?

Q. Yes.

A. Yes, sir; yes, yes.

Q. Well, do you know whether or not that plowing has been interrupted by water?

A. Well, I should think it was.

Q. Just state your exact knowledge about it.

A. Well, it has been so wet that it was very disagreeable plowing, and some of it ain't plowed in consequence of the wet.

Q. What part of the section is that?

A. Well, it is a little on the north, the most that I have noticed, next to the Taycheedah road.

A. That is, south of the Taycheedah road, or north of the Taycheedah road?

A. It is south of the Taycheedah road.

Q. The gravel road?

114 A. The gravel road.

Q. And next to it?

A. And next to it. There is a piece of some 30 or 40 acres that they plowed there that has been pretty wet, quite wet. Formerly has raised big crops there, and this year poor.

Q. Have you noticed whether any of the plowed land there is under water?

A. Yes, sir; I have seen spots that were ponds of water.

Q. How has the water stood for the season generally this year as compared with former years—I mean the standing water?

A. Well, there has been more standing water on it this year than I have noticed years before.

Q. Can you state any other facts which go to show the condition of the land this year as to the water as compared with former years, anything that you have not stated?

A. I don't know as I really understand your question.

Q. You have stated some things—the plowing, the potato crop, and so on.

A. Yes, sir.

Q. Which go to show the condition of the land this year. Can you state any other facts which you have not stated that go to show the condition of the land as compared with former years?

A. As I told you before, I am not so very particularly ac-

115 quainted with it this year. I have not been over it much, but this piece of land, where the potatoes are, you know the railroad runs very nearly through the center, and I have traveled up and down the railroad to Taycheedah frequently, and I have noticed the crops along. On each side of the railroad is plowed land.

Q. You said, if I understood you correctly, that this 40 acres that was plowed and is so wet had formerly produced good crops?

A. Yes, sir; I have seen big crops. I have had good corn there, and I have had good wheat there on that very same piece of ground. I have seen other crops on it.

Cross-examination by Mr. POTTER:

Q. I want to ask you whether it is not a fact that this season has been a very wet, rainy one?

A. It has been wetter generally than it was. The water was higher this spring.

Q. What I meant to say is, whether there has not been a much heavier rainfall this year than for several years past?

A. I don't know; there has been some seasons we had as much rain as this year, but somehow the lake is up higher than usual. Any way, I have noticed it.

Q. I am not speaking about that; I am speaking about the rainfall, whether there has not been a heavier rainfall this year than for several years past?

116 A. It has been wetter; unusually wet this year, I should judge.

Q. You think it has?

A. Yes, sir.

Q. This piece of ground that you spoke of that was plowed south of the gravel road, state whether that piece of land comes up to the fence that fences the gravel road south.

A. It lays south of the gravel road, and there is a descent.

Q. Doesn't the plowing come right up to the gravel road, up to the fence?

A. Yes, sir.

Q. Do you know how many feet that is above the surface of the lake?

A. No, sir; I couldn't tell you.

Q. Do you say that the water stood on that plowed land there south of the gravel road that came up to the gravel road?

A. Yes, sir.

Q. Where did that water come from?

A. It comes from the—there is a little ravine that comes out a cove—Fuco Cove—that when the water is high the water runs right down through it that way. There is a ravine runs through the lot, and when the water is high, the lake is high, that water flows over, runs out of this Luco Cove on to the land.

Q. How far is this piece of plowed land north of the center of
117 the section, or the line running east and west dividing the section?

A. Well, I couldn't judge. It may be. It runs a little catering. Some parts of it is 150 or 200 rods, and some parts of it is not as far. The lake runs catering.

Q. You are not able to say how far this piece of land is north of the center of the section?

A. No; I couldn't tell you exactly, but it is not a great ways.

Q. Do you know where the Sheboygan Railroad track crosses Taycheedah Creek?

A. Yes, sir.

Q. State whether that is north or south of the center of the section.

A. Well, it is a little north of the center of the section, I should think, where it crosses the creek. Yes, sir; it is north of the section.

Q. How much?

A. I couldn't say how much; only just merely by appearances to look at it. It must be fifty or sixty rods. I don't know but more.

Q. How far is this piece of plowed land that you spoke of here from this point where the railroad crosses Taycheedah Creek?

A. It is west of Taycheedah Creek, this piece of land.

Q. How far?

A. Sixty or seventy rods.

118 Q. State whether the plowed land is higher than the point where the railroad crosses the creek.

A. It is higher I should judge.

Q. How much higher in your judgment?

A. It is not but a very trifle. It may be a few feet higher.

Q. Isn't that plowed land very nearly as high as the gravel road?

A. Very nearly. Some parts of it is as high; some parts of it is not. The gravel road is a ridge running through.

Q. Got an elevated ridge there?

A. How?

Q. The gravel road is an elevated ridge there?

A. Yes, sir.

Q. And this land comes right up to it?

A. Yes, sir.

Q. Isn't that piece of land just as or very nearly as high as the gravel road?

A. A portion of it is; a portion of it is not.

Q. What portion?

A. A small portion of it.

Q. State how large a portion of this piece of plowed land that you speak of is not as high as the gravel road, and in the center of this piece I was referring to.

A. It is not as high by a number of feet.

Q. How is it at the back?

A. There is a ravine. It is a little higher on each side.

119 Q. Take southern portion of that, is not that higher than the center of it?

A. Yes, sir.

Q. There is a little swale or ravine runs down through it?

A. Yes, sir.

Q. What I want to know is whether, taking out the swale that runs through it, the greater portion of this plowed land that you spoke of is not as high as the gravel road?

A. There ain't the largest as high. There is a portion of it, I should judge, nearly as high; may be as high.

Q. And the largest portion is as high?

A. It ain't as high; the largest portion is not as high as the gravel road, because that gravel road is on a ridge very nearly all the way through.

Q. Isn't it very nearly as high?

A. Yes, sir; nearly as high.

Q. Do you know that that water didn't come out of Taycheedah Creek?

A. I don't know, but I should not judge it had. It appears to me that Taycheedah Creek is lower than that land is.

Q. How is it with Luco Creek?

A. Luco Creek is higher a little, I should think.

Q. Are you willing to swear that Luco Creek is higher?

A. Luco Creek is. Luco Cove is not a proper creek, is as high
120 as the lake, just as high as the water in the lake.

Q. You don't undertake to say that the water in the lake is higher than this piece of land?

A. Why no. It ain't higher than the plowed land, but I say the water will flow over from this cove on to this land. I have seen it run over there so that it was—in this ravine was 2 feet deep, and more too.

Q. Do you know where the old State road used to run?
A. Where? What road?
Q. The old State road used to run?
A. Yes, sir.
Q. North of the gravel road on this Pumpelly track?
A. Yes, sir; I have traveled that road formerly—years ago.
Q. How does that land compare in elevation with the gravel road—where the State road run?
A. That is not as high as the gravel road was.
Q. It is not as high?
A. It was not as high. That was operated years before this section was occupied.
Q. Isn't that land, where that State road used to run, high, dry land?
A. Lies as high as any land about—on the section.
Q. What?
A. I guess it is about as high, as a general thing, as any land on the section, with the exception of this ridge that I spoke of.
121 Q. In the gravel road?
A. Where the gravel road now runs.
Q. Isn't that very nearly as high as the gravel road?
A. Yes, sir.
Q. Isn't it dry land?
A. Yes, sir.
Q. On all seasons of the year?
A. I should call it dry land.
Q. That is between the gravel road and the lake?
A. It is south of the gravel road.
Q. How?
A. It is south of the gravel road, and north of the gravel road is wood land now.
Q. Let me ask you if north of the gravel road, between the gravel road and the lake-shore, there was not, in olden times, a State road or a military road?
A. No. It didn't go through there. No road that I ever knew of.
Q. There was none?
A. No, sir. When I first came into the country this section was not occupied. It was not fenced at all. It laid to common; the road run north. I crossed down here where that toll-gate used to stand, and went across the section and across where Gov. house used to be.
Q. When was that fenced?
A. When was that fenced?
122 Q. Yes. You said it was laid out to commons for quite a while.
A. I couldn't tell you exactly. It was fenced up as much as 23 or 24 years ago.
Q. Before that it laid open to commons?
A. Yes, sir.
Q. That land was always pretty wet, wasn't it?
A. Yes, sir.
Q. Were you here before the erection of the dams at Menasha and Neenah?
A. Yes, sir.
Q. Wasn't this land pretty wet before that time, an extremely wet piece of land?
A. It was rather low, I should call it; it was not as wet as it is now.
Q. Wasn't it considered a wet piece of land?

A. Yes, sir.
Q. Always?
A. Yes, sir.
Q. How long have you lived in that neighborhood?
A. Oh, about 27 or 28 years.
Q. That's all.

Redirect examination by Mr. GILLET:

Q. You spoke of this being wet land originally, that was before it was cultivated and fe'd, and the grass cut on it?
A. Yes, sir. It laid in a state of nature; there was not any cultivation.
123 Q. You assisted Mr. Newton this last year in setting some stakes?
A. Yes, sir.
Q. For the outlines of the water as it was then?
A. Yes, sir.
Q. Do you know how the water has stood since that time in reference to those stakes, whether it is lower or higher than those stakes?
A. I stuck two or three stakes, at the request of Mr. Pumpelly, last spring.
Q. How is the water now in reference to them?
A. Well, the water has been decreasing since then.
Q. Yes.
A. But not as low as it usually is.
Q. You stuck certain stakes, did you?
A. Yes, sir.
Q. It was at the edge of the water?
A. Yes, sir.
Q. The boundaries of the water?
A. I stuck very nearly at the outlet of this cove on to this land, and then up above by the flax building. I had a stake stuck by the bridge.
Q. When did you do this?
A. I should judge it might have been April. The first of April or the middle of April, it might have been.
Q. Were those stakes stuck along the bank of the cove there?
A. A little below the bank.
124 Q. I mean at the edge of the water along the bank of the cove?
A. Yes, sir.
Q. Didn't you stick some out in the fields on the low ground?
A. Yes, sir. I stuck three or four on the low ground.
Q. Do you know anything about how the water has stood since that time as compared with the water then or since April?
A. No. I have not noticed very particularly. I went and stuck the stakes by the request of Mr. Pumpelly.
Q. Was Mr. Newton, the surveyor, with you?
A. No, sir.
Q. These are not the stakes I am inquiring about. Did you stick some stakes with Mr. Newton?
A. Oh, yes, sir. I was with Mr. Newton, and he made some marks along, some on Luco bridge and some down along, and I was with Mr. Newton. I had forgotten that.
Q. That is what I was calling your attention to.
A. Yes, sir.

Q. Have you observed the condition of the water since those stakes were set?

A. Yes, sir. The water decreased gradually along through the summer, and it is not as low now.

Q. You have not any memorandum of that matter?

A. No, sir. I didn't suppose I was going to be called on.

125 Q. Mr. Newton kept the record?

A. Mr. Newton kept the record, if there was any to be kept.

Recross-ex. by Mr. POTTER:

Q. I want to ask you whether there is any water standing along this Pumpelly tract south of the gravel road?

A. Now I couldn't tell. I have not been on there for a number of weeks. I wouldn't be positive whether there is a drop of water there. It is my impression there is.

Q. Will you swear that there is any water standing now on the Pumpelly tract south of the gravel road?

A. At this present time I wouldn't testify, because I have not been there.

Q. Do you know where the west line of this section 1 is?

A. Yes, sir.

Q. Is it west of Luco Creek?

A. Why, the west line is west of Luco Creek.

Q. You know where the bridge crosses Luco Creek?

A. Yes, sir; we call it Luco Creek or Luco Cove.

Q. Where the bridge crosses Luco Creek, is the west line of section one of the Pumpelly tract east or west of that point?

A. It is east of where you cross the creek.

Q. How many rods?

126 A. Oh, not but a few rods to the line; the line comes up close to the bridge, or near the bridge.

Q. I don't expect you can tell exactly, unless you have measured. Give an estimate?

A. From the north end of the bridge to the line it may be 6 or 7 or 8 rods. It may be 10 rods possibly.

Q. Isn't it more than 10 rods?

A. I shouldn't think it was.

Q. Will you swear that it is not 20 rods to the west line of this tract?

A. From the north side of the bridge?

Q. Yes.

A. I would be positive that it ain't 20 rods.

Q. That's all.

Redirect examination by Mr. GILLET:

Q. You say the west line of this section is fenced?

A. Yes, sir.

Q. Do you remember where that line or fence comes in reference to this bridge—the Luco bridge?

A. There is a piece sold off, occupied by another man, just west of the bridge, on the north side.

Q. That is Fountain's piece?

A. No; it is another piece, that Dunn formerly owned.

Q. Fountain and Dunn?

A. Dunn. A man by the name of Gabriel owns it now.

Q. Do you remember that section line, how it comes by there with reference to this bridge?

127 A. The section line? There is a gate comes in right by the old flax building, joins right up to the section line, and it is not certainly over 6 or 8 rods from the bridge; it ain't that.

The pl'ff then called as a witness H. PARMALEE, who, being du?y sworn, testified as follows:

Direct examination by Mr. GILLET:

Q. Where do you reside in reference to this section one, in Fond du Lac—the Pumpelly tract?

A. I live where the toll-gate used to be, on the gravel road—Taycheedah gravel road.

Q. Look on that map and see whether you recognize that as a proper outline or representation of that section?

A. I would rather see another map.

Q. I asked you if you recognized that as an outline of the section?

A. Yes, sir.

Q. Where do you live?

A. I don't live on this section. I live away down here somewhere.

Q. On the gravel road?

A. Yes, sir.

Q. What place?

A. I live just this side of Denevue Creek.

Q. At the toll-gate?

A. Where the old toll-gate used to be.

Q. The old toll-gate house?

A. Yes, sir.

128 Q. Have you done any work on this section one this year?

A. Yes, sir.

Q. What work?

A. I have husked some corn there for Dr. Gray, and done some plowing.

Q. What part of the section did you do your plowing on?

A. I should think some of it was near the center.

Q. What field is it?

A. South of the railroad.

Q. South of the railroad?

A. Yes, sir. I think all the plowing my team did was south of the railroad; I think it all was. I don't know but they worked a little on the other side, but not that I know of. I was not with it all the time.

Q. What had the land that you plowed been used for before; was it meadow or formerly plowed land?

A. It was plowed before.

Q. Did you break up any sod there?

A. No, sir.

Q. Have you been much on section one during this year?

A. I have been considerable there.

Q. What has been the condition of that land in respect to water during the summer?

A. Well, when I was cutting hay there——

(Defendant objected to the testimony in regard to the condition of the land since the trial was commenced.)

129 WITNESS. I cut some hay on part of this land.

Q. What part of the section did you cut hay on?

A. I couldn't tell you exactly what part, but I think it is somewhere

nearly east, perhaps rather southeast. I should say nearer the southeast part.

Q. East or west of the creek?

A. It is east.

Q. East of the creek?

A. Well, part of it.

Q. I mean the creek that runs down through the section, near the center of the section?

A. There is a small creek there, that I couldn't name the creek; I couldn't tell whether it was the main creek or not that I have cut both sides of.

Q. I don't care what part you cut your hay on, or where you did your plowing. What I want to know is what kind of observations you have made there about the water?

A. Well, I had to stop cutting hay on account of the water; the machine would run under water when I was cutting. In places I thought that they might plow, and I went over with my hired man to see about it, and they couldn't plow on the road.

Q. Why?

A. It was so wet, and I took my team home.

Q. When was this that you were doing this haying? The early part of the haying season?

A. I couldn't tell you what time it was. No, sir; it was the latter part of the haying season.

130 Q. Was this water from a rain-storm?

A. Well, the water came from this creek—that I couldn't tell you.

Q. It came from the creek?

A. Yes, sir.

Q. Had you been having a rain-storm? Was it a kind of an overflow from a rain-storm, or was it water that came from other causes; came from the lake or where?

A. I couldn't tell you.

Q. You know whether there was a heavy rain-storm, and it was the overflow of the land from the rain?

A. I couldn't tell exactly about that.

Q. Well, had there been any rain?

A. I think there had been some rain.

Q. Had there been any to make this overflow?

A. I couldn't say that there had. I can tell you one thing that I know.

Q. Well, tell me that.

A. Where I lived at the time it was wet; the water would be up there from the lake. It has covered that flat in front of where I live.

(Objected to as not responsive to the question.)

WITNESS. And the water at Luco, where it crosses, would be up so that it crosses the road.

(Objected to.)

WITNESS. This is on the same land.

131 Q. What did you observe about the condition of the water at other points of land? Now go on and state what you were going to.

A. The water from Luco there came up, so that I had to drive through the water to get across on the land to the other side.

Q. Where was that water from?

A. From the lake.

Q. State about the water where you were doing your plowing.
A. That plowing was near the east side of the section.
Q. The south side of the gravel road?
A. And the south side of the gravel road, too; both gravel road and railroad.
Q. Extending across the railroad?
A. Yes, sir.

Mr. POTTER:

Q. Near the east side of the section did you say?
A. Yes, sir; I think it is near the east side of the section.

By Mr. GILLET:

Q. Is it the square field that was spoken of by Mr. Moore?
A. No, sir; but where I drove through the water is the same field that he spoke of, when I crossed through here.
Q. Where is that field that he spoke of and that you crossed through the water?
A. It is just a little ways across the Luco bridge, on the south side of the gravel road.
132 Q. And there was a piece of corn on part of that last year wasn't there; a year ago I mean?
A. I think it was then.
Q. That is the field, was it then?
A. Yes, sir.
Q. Next east of Luco Creek, and on the south side of the gravel road?
A. Yes, sir.
Q. Is that the field you went through the water on?
A. Yes, sir.
Q. In going to your work?
A. Yes, sir.
Q. What was the ground under that water; was it plowed land or not?
A. Well, where I crossed through the water it was not plowed ground.
Q. Did you notice any crops there that were affected by the water?
A. I noticed corn on the south side of the railroad that seemed to be affected very badly by the water. My team went through there when we were going through the corn, and the wagon and horses would go into the mud pretty bad, picking up the corn, what little there was. It was very poor; very poor corn, and little of it.
Q. Any other crops?
A. I saw a piece of oats that was cut a little after the corn tasseled, I think. It was the last time I was there; a short time ago.
133 It was not gathered up.
Q. Do you know why not?
A. It was so wet that it didn't amount to anything.
Q. Did you see any other crops affected by the water?
A. I saw some barley that I thought was not very good on account of the water.
Q. Did you see any potatoes?
A. Yes, sir.
Q. How about those?
A. Those were very poor.
Q. How was the water on the potato-patch?
A. The water stood on there at times considerable.

Q. Standing up between the hills, the rows?

A. Yes, sir; when I was cutting my hay the water stood there.

Q. How much of this section were you familiar with during the last summer, the whole of it?

A. No, sir; not the whole of it.

Q. Then how much of it?

A. I couldn't tell exactly, but I should think about half of it.

Q. What has been its condition and fitness for cultivation this year in respect to the water, that part of it that you have known?

A. Well, the most of it could not have been cultivated at all on account of the water—the water from the lake. I have seen the water extend from the lake, when the north wind blows, throw it right
134 up on there and stand there; some stood there considerable, too.

Q. Have you any idea how much standing water there has been there this summer on that section?

Counsel for plaintiff offered in evidence the Revised Statutes of New York in relation to the execution of deeds, for the purpose of proving that those deeds heretofore offered were properly executed.

(Objected to the method of proof.

Objection overruled, to which defendant excepted.)

COUNSEL FOR PLAINTIFF. For the purpose of showing the commencement and pendency of an action by Geo. J. Pumpelly in his lifetime against the Green Bay & Miss. Canal Co., I offer in evidence a transcript of the record in that case as it went to the Supreme Court of the United States, showing the pleadings in the case.

No objection on the ground that they are not originals. Papers marked Ex. 5. Also offered in evidence a copy of the pleadings that were served in the case which contains all the pleadings, marked Exhibit 6.

Also offered in evidence a demurrer to the whole declaration, marked Exhibit 10.

Also offered in evidence a special demurrer to the second, third, fourth, sixth, and seventh pleadings, marked Exhibit 11.

Also offered in evidence a replication as to the 7th plea, marked Exhibit 7.

135 Also offered in evidence a replication to the 3rd plea, marked Exhibit 12.

Also offered in evidence a demurrer to the 2d, 4th, and 6th pleas. Marked Exhibit 13.

(Counsel for defendant objected to the introduction of the whole record offered in evidence, upon the ground that it is not material, and that it is not between the same parties.)

COUNSEL FOR PLAINTIFF. The object of the record is to answer any objection that may be made by way of the statute of limitations, to show that we brought our action against the Green Bay and Mississippi Canal Company long before any statute of limitations could have run; that that action is still pending.

(Objection overruled, to which defendant excepted.)

Counsel for plaintiff offered in evidence the maps that were stipulated might be used, showing the configuration of the streams at Menasha and at Neenah, showing the hights of the dam, the depths of the water, and whatever the maps purport on their face to show—1st, two maps of the streams and dams, marked Exhibits 2 and 3; map of Menasha channel, marked Exhibit 2; Neenah channel, marked Exhibit

3; also map marked Exhibit 14; also map marked Exhibit 15; also map marked Exhibit 16; also map marked Exhibit 17.

Examination of Mr. Palmerlee resumed.

Cross-examined by Mr. POTTER:

136 Q. How long have you lived in this vicinity?

A. A little more than a year that I have lived where I do now.

Q. Where you now reside, and how long have you lived in this neighborhood—in this section of country?

A. I have lived in the town of Fond du Lac, about—I think it is about twelve years.

Q. Where did you reside prior to that time?

A. I lived on this Waupun gravel road, out here somewhere about a mile.

Q. Did you know this Pumpelly tract before the dams were erected in Menasha?

A. I didn't.

Q. Do you know how many acres of this land has been cultivated?

A. I couldn't tell.

Q. How many acres are there in the tract that was plowed near Luco Creek just south of the gravel road?

A. I couldn't tell how many acres there is of it.

Q. How many do you think? What is your estimate?

A. I never looked at it with reference to that at all. I never thought anything about it while passing there. I couldn't make a very good estimate of it.

Q. You spoke about a patch that was planted to potatoes on this land?

A. Yes, sir.

137 Q. How large a patch was that?

A. Well, I should think there was perhaps ¾ of an acre. It may be more or less. I couldn't tell.

Q. Was all the land that was plowed there in that particular locality planted to potatoes?

A. No, sir; it was planted to corn, part of it.

Q. How much land was plowed then that was planted to corn and potatoes?

A. I couldn't tell.

Q. Give an estimate of it?

A. Quite a number of acres.

Q. About how many?

A. I couldn't guess anywhere near it. It would be guess-work with me. There might be 10 and there might be 15 acres. I couldn't tell.

Q. Are you a farmer?

A. I have been, part of my life.

Q. Ain't you able to tell whether there was 10 acres or 15 acres in that tract of land that was plowed, or to guess any nearer than that?

A. I never looked at it with reference to that at all.

Q. You don't know then?

A. I don't know how many.

Q. You couldn't tell within 5 acres how many acres there were there that was plowed?

A. No, sir; I couldn't.

Q. What other tract of land on this section one, south of the
138 gravel road, do you know that has been plowed at any time

besides this piece that lies near Luco Creek, and the piece that has been planted to corn and potatoes?

A. There is a piece west of this corn that is plowed.

Q. What section of land?

A. On the same section; close; just a road between.

Q. How large a tract is that?

A. Well, I couldn't tell any more than I think there is quite a large piece of it.

Q. How many acres probably?

A. I don't know that I could tell within ten acres of it.

Q. You are not a very good judge of quantity?

A. If my attention was called to it, I could tell something near it perhaps.

Q. I understood you to say that you had worked on this piece of land this year?

A. I have.

Q. Been over it?

A. Yes, sir.

Q. Passed over this plowed ground?

A. I passed right between the two pieces, and over the potatoes and corn.

Q. Have you worked upon these premises any year before this year?

A. No, sir; not at all.

Q. By whose direction did you go there this year to work?

139 A. Part of it was through Dr. Gray's, and part of it was through Mr. Hunt, a man that is working the farm there now; and part of it was on mine. The first of it, I bought some hay down on his land; not of either one. I bought it from a man that had rented it. I went to cut the hay for myself.

Q. That lot was on the south part of the section?

A. It was the southeast part, I should think.

Q. On which side of Taycheedah Creek?

A. I think it is west of Taycheedah Creek.

Q. You think it is on the west of Taycheedah Creek?

A. I think so; yes, sir.

Q. There are some stacks of hay down there now, are there not, on this section?

A. Yes, sir.

Q. Was it in the vicinity of those stacks?

A. Well, the hay was on both sides, I think, of it; yes, sir; it was near that.

Q. It was near the hay that is stacked there now?

A. Yes, sir.

Q. You cut some hay there this year?

A. Yes, sir.

Q. What was the condition of the ground there?

A. It was very wet.

Q. It was wet?

A. Yes, sir.

Q. Don't you know it to be a fact that through this present season we have had some very heavy rain-falls—heavy showers?

140 A. We have had considerable rain.

Q. More than we had last year?

A. Yes, sir.

Q. Or the year before?

A. Yes, sir.

Q. Or for several years?

A. Yes, sir; there have been heavy rains.

Q. Don't you know that during the present summer there has been some very heavy showers that flooded this land here—flooded low lands?

A. I don't know. I have seen showers that have flooded the country, but I don't know of any this year that has flooded.

Q. You don't?

A. No, sir.

Q. We have had some heavy rains?

A. We have had some heavy rains, but not as heavy as at some other times.

Q. The land has been more wet during this summer?

A. Yes, sir.

Q. From rain-fall, I mean?

A. I should think it had.

Q. You spoke in your testimony this morning of crossing this plowed ground and crossing some water?

A. Yes, sir.

Q. State whether that water was not in a ravine; a natural ravine over this piece of land.

141 A. The water was there in a ravine, but it came from the lake.

Q. I didn't ask you where that came from.

A. The water that I crossed was in a ravine.

Q. It was not on the plowed land at all?

A. Not where I crossed.

Q. State whether it is not a fact that this tract of land—this section one—has a number of ravines running through it, natural ravines, low places, what we call swaley places?

A. Well, there is. I don't know of any in particular, but there is a little creek runs through it.

Q. I am speaking of low ravines or swales; you know the meaning of those terms?

A. Yes, sir.

Q. Isn't it a fact that this land has a number of those natural depressions in the soil on it; swales or ravines?

A. Well, there is a low place, and a lower place than the most of the land is that runs a little south of the Taycheedah road. It runs down through it that way. That is all I know of in particular.

Q. That is all the swale or low place that you know of?

A. Yes, sir.

Q. Is that one?

A. That is all that I am acquainted with beside the creek.

142 Q. You have not been over it a great deal?

A. I have been over it considerable, the part that I told you of.

Q. And you never discovered but that one?

A. No, sir.

Q. Where did this water come from that you saw in the field that you were coming across there during the summer; that didn't come from Luco Creek, did it?

A. That was next a little creek that runs through the land.

Q. Where did that creek come from?

A. I don't know where it originates; I couldn't tell.

Q. Do you know the name of it?

A. No, sir.

Q. Luco Creek, was it?

A. No, sir; it is a creek near these hay-stacks.

Q. And the water came from that creek?

A. I think it did.

Q. Do you know that a portion of it didn't come down from the clouds; didn't come down in rain-falls?

A. No, sir; I don't know as it did; I don't know that it didn't.

Q. You ain't positive, then, where it did come from?

A. No, sir; that I couldn't tell.

Q. Have you been upon this land within a short time—within a few weeks?

A. I think it is about two weeks since I was there.

143 Q. Were you down about where the railroad bridge crosses Taycheedah Creek?

A. No, sir.

Q. Or in that vicinity?

A. Well, I think it must be near; I have not been to that bridge on the railroad.

Q. Have you been to the creek anywhere in that neighborhood—to Taycheedah Creek anywhere in that vicinity?

A. I think not. I think the creek that is on that land is not what you call Taycheedah Creek, but still I don't know; I think the creek where the hay-stack is is not Taycheedah Creek.

Q. If you have been over that land, as you say you have, you know that there is quite a large portion of that land that is grown up to willows and brush along the line of the creek.

A. Yes, sir; there is some spots.

Q. There is a large quantity of willows and brush along the line of the creek?

A. Yes, sir; some spots and willows.

Q. The creek that runs through that brush?

A. You mean the creek that runs through the farm?

Q. Yes; I mean the creek that the Sheboygan and Fond du Lac R. R. crosses on this land, and along the line of that creek is a large growth of underbrush, all willows and holes.

A. I answered it is some willows there.

144 Q. Do you know anything about the fact as to whether there is a current in that stream near where the railroad bridge crosses the creek?

A. There is a current in the stream where I have crossed it, but I have not been to the railroad bridge.

Q. You have not been to the railroad bridge?

A. No, sir.

Q. You are not able to tell how many acres of corn has been plowed there on that land?

A. I am not able to tell, but there is a good many. I couldn't give anything of a close estimate.

Q. Do you know whether or not the greater portion of that land is still unbroken, never has been plowed—I mean the land south of the gravel road?

A. I know there is considerable of it that has not been plowed, but I could not tell whether it is the greater portion or not.

Q. You couldn't tell?

A. There is a good deal that has not been plowed, and there is a good deal been plowed.

Q. Do you think there has more of it not been plowed than there has been plowed?

A. I should think that there is more grass land at the present time than there is ground that has been plowed. Whether it has been plowed before I don't know.

Q. Is not there more than twice as much land there now as
145 there is land that is already under the plow?

A. I should think that there is, still I couldn't tell about it.

(Counsel for plaintiff proposed to read the testimony of several witnesses that were sworn before the commissioners, which were sworn after the witnesses were sworn on the part of the defendant.

Counsel for the defendant objected to the order of the proof; the testimony proposed to be read being in the nature of rebutting evidence. Objection overruled, to which counsel for defendant excepted.)

The plaintiff then called as a witness N. C. GIFFIN, who, being duly sworn, testified as follows:

Direct examination by Mr. GILLET:

Q. Are you the county judge of Fond du Lac County?

A. I am.

Q. Isn't the paper which you handed to me a paper belonging to the records of your office?

A. Yes, sir.

Q. It shows the appointment of Frank L. Jones as administrator of the estate of George J. Pumpelly, of the village of Owego, County of Tioga, in the State of New York, on the 16th day of May, 1873. These letters are granted by Chas. A. Clark, county judge of the county of Tioga, under his official seal as surrogate, with the certificate
146 of exemplification under seal by the same surrogate. Are these filed in your office?

A. Yes, sir.

Q. On what day?

A. 13th day of June, 1873.

(Objected to the introduction of this evidence on the ground that the statute requires that a foreign administrator before he shall be allowed to sue in a court of this State shall file an exemplified copy of his appointment with the county judge, and that that fact shall be stated in the petition. Unless that fact is stated in the petition it is incompetent.

Objection overruled, to which defendant excepted.)

TILLY WALKER, called on the part of the claimants, being sworn, testified as follows:

I am not quite seventy-one; will be first of next month. I reside in Neenah, on the lake shore, about four miles above the Neenah dam—about three and one-half miles by the road. I have lived there since 1850; lived there ever since; moved on to the place in 1851. I have been constantly familiar with Neenah and Menasha since I have lived there. Both of those dams were skeletons. The Menasha dam was built, I think, in 1850; might have been built or commenced in 1849. It was completed after I moved on to my farm. It was a four-foot dam when started, built of logs and brush. Some four or five years before it was completed, I know this by my being there, and
147 seeing them working on the dam. I drawed stone for Mr. Reed when he had the job of building the locks. I drew stone for

him in 1852. I recollect it because I sent to Chicago for a team, the second year after I came on the farm, and I drew stone with that team. They were adding gravel and stone to the dam for some years, and then in the end they made a road across the dam. There was a little bit of a bridge that went over the bulkheads. When I first came there, there was a good road along the beach, and I grew good corn where, now, nothing but cat-tails will grow. I think the water has raised about two and one-half feet. I have a butternut tree across a ravine; I used to cross on that to a ridge. The water has come up to cover the roots. I measured the depth of the water at that point when the asylum was built. This stump is inland, not down on the lake shore. There was no water there when the water was in a settled stage. That point from where I made a measurement was distant about thirty rods from the lake shore. I can't tell you exactly when the measurement was made. It was when they were locating the asylum. It was two feet deep there at that time. It was not as high then as it had been. I made the measurement in the fore part of June.

148 The water was higher that spring than when I measured it. I am speaking of where the water was standing on the level of the lake. The water has come up on to the roots. It was two and one-half feet above the bottom of the ravine. I am a farmer and have been ever since I came to Neenah. I came from St. Lawrence Co., N. Y. Lived at Sheboygan Co. four years, then went to Neenah. I worked on the St. Lawrence, boating and rafting; was engaged in that twenty-six years. Plenty of rapids on that stream, the Oswegechie. I had some experience to see the effect of dam'ing water on the rapids of that stream. I was sent by a man to get some logs off the rapids. There was a flat rock for forty rods, extending up the rapids at the lower shute; that was all filled with logs. It did not extend up to the next rapid; there was about forty rods of deep water between that and the next rapid above. The next rapid above was about three and one-half feet fall; that was about five rods long, and above that there was swift water about three feet fall. The whole descent was seven and one-half feet down to where we were getting off the logs. The stream was about forty rods wide. The upper shute was stuck full, as all the rapids were, down to the flat rock, and that was full. I was working for Geo. Sheppard. We rolled logs for two days to get them off the schute. Got sick of it; then sent a man up

149 to a mill, about five miles up the river, where Sheppard had some three-inch plank. We made horses and stuck one end down clear across the river at the flat rock, and then we put down the plank until we made a good dam, when the water raised and we noticed the logs commenced to roll above us on the next rapid, and then on the one above it, and finally we went up and run the logs down from the rapid above until all the logs were down. The dam was about three feet high. They came down because we increased the height of water in the river and on the rapid. We did not build our dam as high as the upper rapid, yet the water was raised on the upper rapid. The upper rapid was about three-fourths of a mile from the dam.

Cross-examined by Mr. GILL:

I did not measure the exact hight of the dam. We put in five twelve-inch plank on a bevel. We did not take a level of the rapids. The engineer told me about the level. We were about three days putting in that dam. There are two rivers that come in just at the head of the

rivers, the tributaries. I don't know how long they are. I have been up there some forty miles. This was a butternut tree I was speaking about torn up by the roots. It lay across the ravine. There was some water in the ravine at that time. There was a foot of muck and
150 then gravel in the ravine. The roots of the tree came right out of the muck. It was about 12 feet from where the root stood to the deepest part of the ravine. Whenthe water would go down in the spring it would come up to the roots of the tree and would run out before the water in the lake would rise. Never measured the water in the ravine before 1850. Last year it was not exactly dry, but was kind of dry. The water has not been as high in the last three years as before. That stump is two foot through. The roots stick up where I made my observation. It fell 23 years ago. I measured when they were locating the place for the asylum. I found two feet there about first of June. Water was quite a good deal higher that year. Measured it with a stick and then measured the stick with a rule. The root was then six inches, that is, the top of it, above that. I have got several other places where I have measured, but none so permanent as that. I consider that my measurements show that it has raised about two feet. The water is two feet higher in the spring of the year than in July. I claim it is two and a half feet higher now than when I came. As you are looking on the water your eye is good to a fraction of an inch in a foot. When I came there, there was a good track along the shore in from my place. Now it is all washed away for fifteen rods wide all along my place.

Redirect:

151 The ravine was dry land only in the spring. The water would run out in the spring. It would be two feet deep in spring, but would run out entirely, and then when the ice would thaw in the lake the water would set back into the ravine. The water in the place where I measured it was two and a half feet higher than when I first came into the country. When I measured the water and found it two feet deep it was comparatively still. You could see that straws, etc., would move slowly. The ravine now in low water gets dry. I cannot raise good crops when water is two feet below the surface.

Recross:

My experience in soil is that there are veins in land the same as in your body. Clay in its natural state is full of veins; sometimes they are close and sometimes far apart. I have a well on my place 12 feet deep. The vein comes from the west.

By COM. Which way from Neenah is your farm situated?

A. Three and a half miles this way from Neenah.

(Counsel for defendant objected to the testimony of the witness Tilly Walker, in which he gives an account of dam'ing the Oswegechie River, in New York, and the effect had on the water, upon the ground that unless the evidence shows that the building of the dam on
152 this stream would have the same effect as the building of the dam on the Fox River, it is incompetent, irrelevant. Before plaintiff can put that evidence in, they must show that the nature of the two streams is the same; that the banks are similar; that the character of the soil is similar; and the circumstances surrounding the streams must be the same.

The court overruled the objection, to which ruling and decision the counsel for the defendant excepted.)

Counsel for plaintiffs then offered in evidence an exemplified copy of letters of administration in the Pumpelly estate, showing Frank L. Jones to be the administrator, marked Exhibit 18; filed in the office of the county judge of Fond du Lac County.

J. C. HOAGLAND, being duly sworn on the part of the claimants, testified as follows:

I live now 64 West Second street, in this city. I came into Fond du Lac in 1848, last day of May, about sunset. I landed at Taycheedah. I lived in Taycheedah about two months, and then went east about one and one-half miles, on section 32, until nine years ago, when I came into the city. I think the stone mill was not in operation at the time I came, but was built. There was a saw-mill built to it, can't say, but think, about two years after that. It was built about 20 feet from the mill to the saw-mill, and between the mill and the lake.

153 The saw-mill was forty feet long. That run directly from the steam-mill towards the lake. There was a logway built from the saw-mill into the lake, and there was a space about twenty feet under the logway, about twenty feet wide, where teams could drive; then the logway from there run on an incline into the lake. I worked on the mill at that time. I was a carpenter at that time. I worked in and around the village of Taycheedah about two-thirds of five years. I helped build a saw-mill between Wengel's store and the present bridge. It was, after it was built some time, called the Potter mill, as he bought half of it when he was building the plank road there. The mill was about half way between the bridge and where they sell beer now. It was from 150 to 200 feet from the road to the lake shore. The mill was about forty or fifty feet to the water, as there was a driveway the same as along by the Geisse mill. There was a tier of lots along there. Had some corn there, and Arimand built a brick house, the pressed brick, along there somewhere. Peter Adams, from , bought some lots there. I have been along through there about every month in the last twenty years. These lots we speak of have all been washed away, and even in some places has taken some of the road. The lots are

154 gone. The water commenced raising about in 1850 or '51 or '52, and has kept gradually rising from year to year. I was in the Frank Smith house in 1850, and was in the cellar then. It was all dry. Was again in there about 12 years ago, and there was fifteen inches of water in the cellar. It is south of Beall's house. They have got to move the house, as there is too much water there—eighteen inches—in the cellar this spring.

I was down there yesterday with Dr. Gray; went out in a boat with him. We started from that bridge across Taycheedah Creek, and went about as near where the old shore used to be, and took soundings toward the old Geisse mill. The loamy land did not run right to the water when I first went there. There was a gravel beach then at the lake. I should think that this sand beach was about one foot, or ten inches, above ordinary stage of water. When we measured yesterday we tried to go by the old water shore as it used to be. Some places it would measure two feet ten, some places three feet. We went clear down to the Geisse mill. I should think, as near as I could tell, from the gravel road to out where we were was 150 or 200 feet. We kept along the shore down to the mill. We got a cord at Mengel's and measured out about 150 feet from there, and still think we were inside, if anything, of the old shore. We had a hickory, and measured the

stick. After we had measured the water on the stick, we tied the cord at the mill and rowed out into the lake. The land at the mill slanted
155 into the lake. It stood on rather low land. Between the lake and the saw-mill the top soil had been washed away, and left the bed of gravel as hard as a gravel road. Teams could go over it with a heavy load. I did not measure the land over where the Geisse saw-mill was. Did not measure over the Potter mill. There was a fine fountain at the Potter mill; it was forty or fifty feet from the lake shore. We didn't go to that fountain, as we couldn't tell exactly where it was, as the penstock was down. There was another mill on other side of creek towards Fond du Lac. Crantz owned it. It was built long time after the others. That was built about eighteen years ago. It was built upon dry and solid ground. Mr. Potter took the engine down to Chilton. The building was all taken down, and the ground was washed away. There were nice banks along the creek. I used to go there fishing when I worked the farm I have spoken about. I have passed up the creek in a boat out on to the prairie fishing for pickerel from '62 to '64. Couldn't do that when I came. There were trees on the bank at that time. They were on dry ground. There was nice land along there that has since been covered with water. Well, I should think the rise of water there must have been three or four feet at the settled stage of water. The water was quite still yesterday. The wind
156 blew the water down the lake if anything..

Cross-examined by Gen. GILL:

In the roadway there was a gravel bottom where the water had washed the surface soil away. The roadway on the lake side of the mill was anywhere in the fifteen feet under the logway. They could drive the team anywhere in twenty feet. The logway run on a stand into the water. It was about eighty feet from water to saw-mill in low water. The mill was forty feet long, then twenty feet from saw-mill to grist-mill. It was directly between the mill and the lake. The line of the saw-mill on the south side, you might call it, was nearly on a line with the grist-mill. If there was any space it was on the other side of the mill. That logway was not very steep; it run way out; they used to float logs up on it—say 3-feet logs. When I came here the Geisse mill was not running. I was in the mill and saw he pumped the water from a cistern or well. Cannot say anything about a wooden conductor to bring the water into the mill. I never saw a wooden box running from the grist-mill into the lake. It was Frank Smith's cellar that got so damp. I lived in there 1863, 1864. I was once in it in 1850. The dust did not fly there, but it was as dry as here. He had a fine crop of onions and he took me in to show them to me. He had no drain in it. I put one in, but it did no good. I did not measure
157 the water in the cellar, but could see the strip on the wall. It would come up on second step of cellar. I did not step into it a great deal, for I knew where it was. It would rise and fall with the lake. I made the drain. That house is a good ways from the lake—say from one-quarter to one-half of a mile. Lived in Smith house little over two years. Water would run out of cellar when lake would go down. Didn't dry out very fast in the cellar. We started from the mill and measured with a line 145 feet long. We found about two feet ten inches of water there. It was not hardly out to the end of the logway. It was from sixty to seventy feet from the end of the saw-mill to the water's edge in common water as it was in summer. It was not a very steep logway. There were supports under the logway to hold it up.

By Mr. HOTCHKISS:

You have spoken of a stone support. Did you find it yesterday?

No, sir; it was out considerably. When the water was low you could see the stone support, about fifteen or eighteen years ago; of late years couldn't tell what has become of it. I have no means of knowing, only from general observation, as to whether the water has been raised. On the bridge at the plank road I have known the water to come up
158 and take the plank off the bridge. You could take measurements from water on land. Don't know as it was in a big gale from the north. I know a place eight feet high of bank that has been washed away some rods.

GEO. W. WILLIAMS, being duly sworn on the part of the claimants, testified as follows:

I have lived here since first week in May, 1843. I was here before any dams were built across the outlet of the Lake Winnebago. My residence is on the bank of Fond du Lac River, on east branch. I have been familiar with the stages of water in the lake and river, as I have lived on the bank of the river. When I first came here I was living at the old Fond du Lac House. That was also on the bank of the river. This was in '43 and '44. The first year I was here, in summer of '43, I was acting as agent for Fond du Lac Co. That co. was organized in '55; it was platted in January, '36; sale of lands was in '35; I took charge of it the spring I came here. I was resident manager. The old map or first map was made in December and January, '35 and '36. The Ellis map was made after '46. I was familiar with the old town plat. I made it my business to become familiar with it. I would go out with gun on my shoulder; not to hunt, but to make myself familiar with the country. There was a public sale of the town
159 property and the property of Fond du Lac Co., in May or June, 1846. Portion of summer, 1843, I had an application to rent Fond du Lac Co. house. I wanted to get some sand to fix house up, and I noticed some sand bars along the river, and I borrowed his dugout; came to get some sand to fix the old house, and I could not float it. It drew about three inches. I worked it out and found another bar where the tannery is, on the southeast corner of block 9. I pulled out through that down to where the railroad now crosses. That is the way the water was then. Some years after I noticed a rise. I noticed it for fifteen or twenty years back, so much so that a raft of lumber came up to Division street bridge. The raft drew about two feet of water. In '44 there was a tax sale at Taycheedah. I drove Dr. Darling down to Taycheedah to attend the sale. He had bid off the southwest quarter of southwest quarter, section 2. The same afterwards was found to be doubly assessed, and as the lot 4, of section 2, Dr. Darling used to cut hay on that. I have not got a spear of grass from there. It is or was all under water, or so wet that you could not get any grass from it. This was in '47, '48, '49. I think I cut some in '46, but none after, as it was too wet.

160 I remember hearing of the dams being built, and think that the land became wet after the dams were built. I may, for one or two years after I got my tax-deed, have cut some grass there. The water in the river, except in the spring freshets, has been about stationary since 1850. I should set the water in the river as from two or three feet higher than when I first knew it; that is, the wind would bring it up that much higher than it used to do. It is higher in the

spring than then, and should think that it is now two feet higher between water in the spring and fall than it used to be. . should put the highest stage of water as about two feet more now than then. I make this at my place on the river, and from there down the river. I think that the water in the lake passed off quicker in early days than now. In early days I had men cutting hay across from where Arndt street now is, and I waded across there at that time by rolling up my pantaloons, and did not wet them in wading across. Unless the lake is full the wind does not affect the water in the river. When full it will affect the water in the river up to Forest street. This section of country was covered with high, coarse grass, such as you will find on low ground. In the wet places flags will grow. At that time this prairie was wetter than now, owing to want of artificial drainage. The Fond du Lac prairie has become very much dryer now than in former days. I
161 have observed in the last twenty or twenty-five years that the water in the river is much higher than in a former day.

Cross-examined by Gen. GILL:

My house is one and one-half miles or so from lake by the river. You cannot be sure of a current in the river, as you will see it run first one way or another. The general drainage of this city is in the river. I have noticed that the river will raise when we have a heavy shower. Have noticed it within a few hours after the rain. Within the last month I have noticed that there has been a rise of water in the river of about two feet right after a heavy rain.

LAWRENCE GEISS, being sworn on the part of the claimants, testified as follows:

I have lived in Wisconsin for 28 years; was born here. My father was the Mr. Geisse that owned the stone mill at Taycheedah. I lived in that place 16 years. I was absent for seven years, entirely absent. I then returned on a visit to Taycheedah, and remained one spring. This was in '70. Since that time have had a roving commission. I have in the past two years lived in Fond du Lac and Taycheedah. My first recollection of a change in the water was in '51 and '52. I remember the building of the saw-mill. There was a wagon drive
162 between the saw-mill and the grist-mill. There was about fifteen or twenty feet between the two mills. The saw-mill was forty feet long. The saw-mill was on almost the same level as grist-mill, except that the grist-mill stood on ground thrown out of cellar. There was a log way connected with the saw-mill. The water was about sixty feet from the saw-mill. There was a fountain about the center of saw-mill; it was a flowing fountain. There was a wooden penstock, ordinary penstock, and a square wooden box for catching and holding the water. That was on the ground floor of the saw-mill. There was no work done below. The shafts and belts of the mill machinery were down below. There was an ordinary chute about four feet wide; it started from second story; it run northwest into the lake; it was about eighteen feet high at the mill; rested on abutments, and run out into the lake about twelve rods. It rested also on trestle-work. The abutments were made of stone; one was on the beach, and the others about thirty or forty feet apart out in the lake. I have found the abutments. I paced the distance from first abutment to water-line of to-day, and found it to be forty-four paces. I tried to take a full pace. It was fifteen paces from the first abutment out into

the lake to the second. It was about an equal distance to the third abutment from the second. I found still another abutment about
163 the same distance from the third. We were a little west of northwest from the old stone mill. There were four abutments for the logway to rest upon, made of square quarried stone. The stone abutments are about ten by twelve—the two outside ones. The inside ones are not so large. These abutments are now all under water. On the outer abutments the water was up to my shoulder by actual measurement, 60½ inches; at the third one I should think it was about 40 inches deep, 45 inches by actual measurement; at the next one you called the water 30 inches deep. I have seen those stone piers frequently. Those piers were above the water in the lake at ordinary stage of water. At former date this abutment was built in a crib filled with stone and sunk. The way which came out of the mill rested on that and then into the lake. I couldn't say how the end that run into the lake was fastened. The way was bolted down on the first abutment. Father put in a breakwater of stone when the water commenced to rise along the face of ten lots. I found those stone to-day. I found broken limestone—quarried stone. I found the line of another breakwater twenty paces inland, that was likewise broken limestone and quarried stone. It was nineteen paces from that breakwater to the present one.
I saw the fountain where Crantz' mill was. When we went down
164 there was a number of sticks standing; when we came back it was dry rock or sand. The water varied from the time. I found the place where the fountain used to be in father's mill. I could feel the water coming up, and also found it to be seventeen inches under water. I think the rise took place in more years than one. I think that in my recollection the lake has risen about four feet. It varies as to seasons; that is, it is the highest in spring and fall, say April, and May, June. I remember the Taycheedah Creek. I was out on the bank towards the village of Taycheedah. It was an ordinary kind of bank, so that we would walk along the bank and cast line and troll. There used to be trees along the bank southeast of bridge. There used to be trees down the creek to the lake about fifteen rods. I remember when there was a tree standing beyond the old ash tree that was about fifteen rods from the ash stump. The tree was broken off. I have been in the Potter mill. We went over the foundations of it to-day. The mill was running, newly built, when I first knew it. It was fifty or sixty feet from beach when I knew it. It was on soil. We found it all under water to-day. I have been in the habit of going over the Pumpelly tract. I have used it for a fishing ground for the last two years. The water generally covers the whole of the northeast forty, a portion of the forty west, and some of the forty south-
165 east of that. A great portion of the three-fourths we could fish on. The water stands on the north-east forty most of the year; in some places it stands there the year round. The last fall a year ago they couldn't get across to the road. They had to go to the northeast of the southeast, and then across Mr. Barry's farm, then around through the village of Taycheedah to the barn. I base my belief as to the rise of water from average gain of water on the beach and the bottom of these piers; the distance they are from top of the water. When I was a boy of about ten years I could bathe off the outside pier. Now, in high water it will be eight feet deep there. That fountain-box was sunk some into the ground, but the top was above the level of the ground. I don't think that there was a box running from lake into the grist mill.

Cross-examined by Gen. GILL.

The timbers of the Potter mill are not there, but the stone foundation is there; some of it is uneven. I have seen the foundation out of water. The foundations are about eighteen inches high; think it is now about six inches below the surface. I think it was about sixty feet from Potter mill to lake shore. I think the foundation of the Potter mill is about fifteen or eighteen inches above the bottom of the lake. Some parts are irregular; and think it is about six inches below the surface. That mill has been gone about nineteen years I
166 guess. I am sure I have found some of the foundation that has never been disturbed. There were four abutments; all stood in the water as far back as I can remember. I can remember back to when I was about four years old. The first one was close to the shore; that one is now forty-four paces from the present shore. I was fifteen years of age when I got my growth. I did the majority of my growing in about that age. I bathed off that pier from the time I was eight until sixteen and seventeen. It was when I was allowed to bathe alone at that age. One could hang on the corners of that abutment when in swimming if one wished to. I could at that time touch bottom on the sides of this abutment. I remember when Mr. Smith's saw-mill was built, the one that father afterwards bought. The water box at fountain was sunk into ground; the top of it came above ground. The fountain was about center of mill. We found the box to-day. I suppose the top of the box is broken off. Don't know as the four sides are there. I felt one corner and two sides. I felt the hole where the water came up. I felt the boards about four inches. The water bubbles up by the side of this box. I felt the water coming up; run my hand down into the sand about four inches. The sand was bubbling up as if there was a boiling spring there. It is on the east side of the box, that is, on the side nearest the beach, three or
167 four inches from the side of the box; I found the northeast and southeast sides of box to-day. I should think this box is about fifty feet from the old stone mill. The top of the boards we did find are seventeen inches below the surface. The water is shoaler away from around the box. I do not remember the original depth of box. I should think the box was about three feet by two. I do not know of any cistern in the stone mill, but there is a well covered up with stone. When the last mill was built they dug a fountain in that. The saw-mill was built in '50 or '51. I didn't go fishing prior to 1849. I have no recollection of tubing in the fountain we found to-day. The Potter mill had a logway similar to the the Geiss mill. There is none of the crib-work left to the abutments. The stone have tumbled down. The one in the lake the furthest is the worst tumbled. The abutments were all the same hight. My recollection of them is that they all stood above water, about one foot in the highest water. I mean that the top of these abutments were on a level. I think these abutments were about ten by twelve inside the crib, filled with quarried limestone. The abutment furthest into the lake is most tumbled down. The water came about to my armpits at the highest point on this abutment. The lake for a large circumference is covered
168 with stone. I measured the depth of water at outside abutment on the inside. The stone that father used was got from the ledge. There was no breakwater put in by my father when I was away. I think the whole quantity of stone is around there that there ever used to be. Some of those abutments stand as they always did.

I don't think that taking away the crib-work would injure the size of the abutment.

The cistern in the mill was used to supply the pumps. The water came into that from the fountain. The box the water run into from the fountain to the cistern. I found the box. It is eight inches square. I did not feel of it nor find it to-day.

I judged of this because I felt of it with a hoe. This box was under the foundations of the mill. I never heard father say anything about a box running into the lake. If there had ever been a box there above ground, or out of the water, I would have noticed it. I could not say how far beyond the last abutment the logway run into the lake. I found the box I spoke about finding; I found it weeks ago.

The plaintiffs then called as a witness E. C. GRAY, who, upon being duly sworn, testified as follows:

I am one of the claimants or plaintiffs in this case. I am acquainted with section one in the suit here. I have known section one
169 about eight years. I have had to do with section one since about the middle of September, 1873.

Q. At the time you purchased from Pumpelly?

A. At the time I purchased from Pumpelly. I was over the section before that time. I didn't have any interest in it.

Q. Look at this map, Exhibit 14. This is the lake shore, and these are the outside boundaries of the section.

A. Yes, sir.

Q. That is the Sheboygan and Fond du Lac railroad track. That is the stream of water running through the section and this is the gravel road. Now, has any part of that land been cultivated since you became interested in it?

A. Yes, sir.

Q. How much of that land is under cultivation at the present time. That is, that has been plowed?

A. I guess about 150 acres.

Q. On what part of the section?

A. Well, it is in different places. There is a piece near this gravel road, and a piece in here about the middle of the section, and a piece on the east side about 40 to 60 acres on this side, on the east side of the section.

Q. On the east side of the section there is a cultivated tract, plowed land of about 40 to 60 acres?

A. Yes, sir.

Q. In the center of the section or near the center of the sec-
170 tion there is a cultivated field or plowed tract of about how much?

A. Well, I should think, perhaps, 50 acres; a little more than that. Between 50 and 70, perhaps. I never measured these.

Q. Then there is a piece on the gravel road, midway between the two lines of the section?

A. Yes, sir. There is a piece plowed in between the railroad and the gravel road.

Q. Somewhere near the middle of the section east and west?

A. Yes, sir.

Q. About how much is there of that?

A. Oh, there is about the same amount, I should think. Not quite as much as here, perhaps; perhaps forty acres.

Q. Have you had it cultivated yourself?

A. Yes, sir.
Q. Cropped it for any part of the time since you owned it?
A. I have.
Q. What success?
A. Well, I have not succeeded in raising a very good crop off of it, any portion of it.
Q. What has been the difficulty of raising crops off that land?
A. It has been too wet.
Q. What has been your experience this present year?
A. Well, we have not got enough off of it to pay the expense
171 of cultivating the land. So wet that the crops were almost destroyed in these portions here.
Q. That is the center portion?
A. Yes, sir.
Q. South of the gravel road?
A. South of the railroad; near the railroad and in this locality here.
Q. Did you work it yourself or let it?
A. I let it.
Q. Have you done any breaking on the premises?
A. Broke about four acres.
Q. Where?
A. This side, not quite near the center of the section.
Q. Is that the only ground that you have broken since you had it?
A. Yes, sir.
Q. Well, state your experience in the matter of that breaking there.
A. Well, we broke a piece there to see how that would make any difference in its appearance, being wet; if that would have any effect making it any dryer; to see what it would do as a sort of experiment.
Q. How did it turn out?
A. Well, we couldn't raise a very good crop on it. It had the same appearance of that adjoining it. We couldn't seed the other, and we didn't want to break any more ground up, as being too wet for any kind of a crop.
172 Q. Is there any part of that section that is high land—higher than other parts of it?
A. Oh, there is a difference, I think.
Q. Where is the higher ground?
A. Well, I think, on the south side, and perhaps the northeast portion of it.
Q. On the south side of the section?
A. Yes, sir.
Q. Well, how is it along the gravel road?
A. There is a piece along the gravel road, near the gravel road, that is dryer than the——
Q. There is a ridge of sand running through the center of the section east and west—not exactly east and west, but in an easterly and westerly direction—that is high ground?
A. Well, it is not so much higher than the rest, but it is drained a little better. It has the appearance of being higher, but yet it is because it seems to be dryer, but I don't think it is any higher by actual measurement than some other portions; than the average, we will say.
Q. You have had that ground surveyed, haven't you?
A. Yes, sir.
Q. By whom?
A. By Mr. Newton, and, I think, Mr. Boardman.
Q. Levels taken?

A. Yes, sir.

Q. What is the character of that soil along the gravel road?

173 A. Well, it is a black loam on the top of the soil; that is, near the surface.

Q. Any part of the ground that is sandy?

A. Yes, sir; some portions of it.

Q. Where is that?

A. That is nearer the lake shore on the north side of the gravel road.

Q. Has there been any hay cut on that land?

A. There has.

Q. This year?

A. Yes, sir.

Q. What part of it?

A. I think on the east side.

Q. What kind of a crop?

A. Well, it was a very light crop. There was a portion of the time during the haying season it was too wet to cure hay and get it dry fit for stacking.

Q. There is a stream of water running through that section, is there not?

A. Yes, sir.

Q. As indicated on that map?

A. Yes, sir.

Q. What is the character of the bank on that stream, high or low?

A. Well, it is not very high nor very low.

Q. What is the general configuration of that section; the surface in respect to ravines or depressions?

174 A. Well, there are deep depressions through it, one from Luco Creek off in this direction—northeast direction.

Q. Extending how far?

A. Extending to the creek.

Q. Running from Luco Creek on the west side *of the side* of the section clear across the section?

A. Yes, sir.

Q. Clear across to the creek?

A. Here we have been able to cross, but this year we have not been able to cross here. We had to go lower down.

Q. Have you been able to cross here?

A. The usual place.

Q. Couldn't cross on account of the water?

A. It overflows from this point.

Q. Where was that crossing that you were unable to use?

A. The crossing was about here, going off in this direction. We had to go lower down.

Q. There was a private crossing—that is, from that crossing there was on the Summit road?

A. Yes, sir,

Q. By which you got on to the farm?

A. Yes, sir.

Q. From the gravel road?

A. Yes, sir.

Q. That you haven't been able to use this year?

A. Not much of the time. We had to go lower down, where the grass was more firm.

175 Q. You spoke of one particular depression, ravine, whatever

it may be termed, from Luco east to the creek. Are there any other such on the section?

A. There are; yes, sir; between the railroad and the south side.

Q. In what direction do those depressions or ravines run on the south part of the section—south of the railroad?

A. Toward this creek, run east.

Q. They are connected with that creek?

A. Yes, sir; they run east toward the creek in that direction. There is really no outlet to them particularly—only the land is covered.

Q. They run from the creek backward?

A. Yes, sir.

Q. Clear across?

A. Yes, sir.

Q. Suppose that water was to flow on to the west side of the section, then out of these ravines, where would be the natural outlets in these ravines?

(Objected to, that the levels determine that fact better than the opinion of any individual, which way the water would go.)

Q. Do you know which way the water moves?

A. I don't positively; no, sir.

Q. There are ravines then on the south side of the railroad that run east and west, that connect with the creek?

176 A. Yes, sir; they run towards the creek. They take their direction east.

Q. That is what I mean.

A. Yes, sir.

Q. Do you know whether there is more than one or two, or what number there are of those depressions?

A. There are quite a number of places so low that hold water. I don't know the exact number.

Q. Do you know of any portion of that section under standing water?

A. Yes, sir.

Q. When?

A. Well, I have during last summer at different times.

Q. On what parts of the section?

A. Near the center, here where there was potatoes planted, and corn. Same portion of that that was mud.

Q. Water was standing there?

A. Yes, sir.

Q. Do you know where the water came from?

A. I don't.

Q. Do you know to what extent, or the number of acres that you have seen covered with water—any idea about it?

A. I have not much. I could tell better by driving on it. This portion of it I tried to drive across—the potatoes and corn—several times and I couldn't; my horses went in so deep I had to give it up.

177 Q. What has been the condition of that section other seasons of the year since you have been interested in it?

A. Well, we have been troubled with water. It seemed a good deal of water this year, or seemed to be affected a good deal more by the water.

Q. How was it last year?

A. There has been portions of it last year that we could not drive over at certain times of year.

Q. Do you remember a field of corn that was planted there last year by Cone and somebody else?

A. Yes, sir.

Q. And the front of it lying along by the gravel road?

A. Yes, sir.

Q. Just along pretty near the road there is a sort of a ridge there?

A. Yes, sir.

Q. What was the condition of that?

A. That is better, though a portion of that field of corn was so wet we didn't raise anything.

Q. That was further down the gravel road?

A. Further down and further north.

Q. What were the crops last year on that land—I don't mean this year, I mean 1875?

A. The crop was very poor.

Q. Were the crops put in in good season?

A. Well, a portion of them.

Q. This year?

178 A. Not this year; no; the land we couldn't plow a year ago this fall, so we had to do some plowing in the spring, and we didn't get them in very early.

Q. How?

A. We had to plow a portion of it that we couldn't plow a year ago this fall, and it made it a little late in getting the crops in some portion of it.

Q. Why couldn't you plow it in the fall?

A. It was too wet.

Q. You had to plow it in the spring?

A. Yes, sir.

Q. Have you seeded or attempted to seed any part of that land?

A. Yes, sir; we tried to seed the whole of it.

Q. What do you mean by the whole?

A. The whole that is under the plow.

Q. With what effect?

A. The seed didn't grow. It rotted I suppose. I understood from what attempts had been made years before that that was the trouble. Mr. Pumpelly had tried to seed it for two or three years.

Q. The seed didn't take?

A. No, sir.

Q. What kind of seed did you use?

A. I used both timothy and red top.

Q. Has that land been cultivated every year since you have owned it?

A. Yes, sir.

Q. What kind of crops have you been able to raise on it?

A. This year?

179 Q. I asked you what kind of crops you had raised on it, and you compared it with others. What was the fact about that crop; was it good or bad?

A. Why, I considered it was a poor crop.

R. Have you been able to raise a good crop of grain of any kind on that land since you owned it?

(Objected to as leading.)

Q. State then as to the extent and quality of the crops that you have been able to raise on the land since you have owned it.

A. Well there is some portions of it that there has been a fair crop, while others wouldn't pay for harvesting.

Q. What portions have you got a fair crop on?

A. This near the gravel road. (Indicating).

Q. Covering how many acres?

A. Well, there is a portion of perhaps 30 acres there.

Q. 30 acres in the whole?

A. 30 acres in the whole, and perhaps ten of that we got a fair crop.

Q. State whether the land has been in the same condition for all the time that you have owned it in respect to its being wet, or whether the land has become more wet or drier, than it was when you first owned it.

180 A. I think it is more wet—that is, affected more by the water. I think perhaps these past two more than three years ago.

Cross-examined by Mr. POTTER:

Q. I want to call your attention right here to just that last statement that you made. You think it is more wet, more affected by the water. What water do you have reference to?

A. Well, I think the water in the lake.

Q. Well, do you know that to be so, or do you speak of rainfall?

A. I know the lake has been higher the past year.

Q. What?

A. I know the lake has been higher the past year, that is last summer, than usual.

Q. This land that you speak of that you tried to cultivate has been wetter this year than it was last year, hasn't it?

A. Yes, sir.

Q. Does that arise from the amount of rainfall—greater rainfall than last year in part or in whole?

A. Yes, sir. In part perhaps, and perhaps affecting the lake, raising more water in the lake.

Q. Doesn't it affect the land itself?

A. It would, I should suppose, some; yes, sir.

Q. How long have you known this section one?

A. About eight years.

Q. You was not acquainted with it before you so purchased it?

181 A. Well, I was past the section, through the section a number of times.

Q. You never done any fishing on it?

A. No; I never done any fishing in the State of Wisconsin.

Q. I asked you to state whether those depressions or ravines are natural or artificial?

A. Well, I think it was natural.

Q. The land that you cultivated—that you put in corn and potatoes—is very near the center of the section?

A. Very near the center.

Q. Do you know what elevation that is above the lake?

A. I don't.

Q. Do you know whether it is above or below the lake at an ordinary stage of water?

A. I should suppose it was above the lake at an ordinary stage.

Q. Do you know whether this point where you raised corn and potatoes was higher or lower?

A. I should presume it is higher. This is all guess-work. I think it is higher—a little higher, perhaps.

Q. Higher? The plowed land near the gravel road?
A. Yes, sir; the drainage is better near the gravel road.
Q. What is the general character of that creek?
A. It runs north.
Q. State whether its channel is reasonably straight, or whether it is crooked.
182 A. Well, there is quite a number of crooks in it; three crooks, however. The general direction is pretty nearly straight.
Q. There are quite a number of crooks in it, are there not?
A. Yes, sir.
Q. State whether along that creek there are not a large number of willows and alder bushes growing, and other kinds of shrubs.
A. I think there are willows. I don't know of any alder bushes that are growing there.
Q. State whether these willows grow into the stream—into the water.
A. Well, they grow near the edge of the stream. I should not suppose they would grow in the water.
Q. State whether the limbs don't fall into the water and remain in the water.
A. The limbs fall over. I should not suppose there are many would remain in the water and grow.
Q. Well, is not it a fact that during the whole course of that channel on that section that a portion of the willows lie in the water, a good many of them?
A. There may some of them, but they are small and don't produce much obstruction to the current.
Q. Which has the greater elevation, the center of the section where you raised corn and potatoes, or the creek immediately east of that point where the section line crosses the creek, in your judgment?
183 A. I wish you would repeat that once more.
Q. I wil try and make myself understood. You have located the corn and potatoes near the center of the section?
A. Yes, sir.
Q. Now go directly east until you strike the creek. What is the difference in the elevation—in the elevation, if any, between these points?
A. I don't know.
Q. In your judgment, what would be your opinion about it?
A. Well, I think it is higher where the potatoes were——
Q. Than at the creek?
A. A little higher; yes, sir. Perhaps about the same height.
Q. What kind of crops have you raised on the cultivated portion of this land since you have owned it?
A. Well, we have raised oats and wheat, corn and potatoes, barley.
Q. Generally that kind of crops appeared to do best on the soil, one year with another, since you have been cultivating it?
A. Well, we sowed the barley this year on the highest portion of that along the lake shore. We had the best crops there. I don't know what it would do to sow it where we had the corn. I presume we shouldn't have got much of a crop.
184 Q. I understood you to testify that the land near the center of the section where you raised the corn and potatoes was higher, in your judgment, than the land that you plowed near the gravel road?
A. I think it is as high, I think I said.
Q. How can you explain that barley being raised there near the gravel road was better than that was sowed on the high land?

A. Because the drainage is better. You have got a low place through here; takes off the water from this direction.

Q. Where does it go?

A. Into the creek.

Q. Taycheedah Creek?

A. Taycheedah Creek; yes, sir. It runs down to there in the spring.

Q. You have these natural depressions running through the section east and west, extending nearly through the whole section, have not you?

A. Well, I don't know as there is any extending nearly through the section. This comes nearest to it, perhaps.

Q. Is there one you spoke of between the gravel road and the railroad track?

A. Yes, sir.

Q. The one that you claim is the best for drainage purposes?

A. Yes, sir.

Q. That carries off the most water?

185 A. It does, off of that particular locality here. It makes this wetter down here. This is all overflowed here.

Q. On what part of the section?

A. Down here (indicating).

By Mr. GILLET:

Q. On the east part, at the mouth of that ravine?

A. Yes, sir.

By Mr. POTTER:

Q. That is north of the gravel road?

A. No, not north of the gravel road; south of the gravel road, between the railroad and the gravel road.

Q. And near the Taycheedah Creek?

A. Yes, sir.

Q. On the east side of Taycheedah Creek?

A. No; the north side.

Q. State whether you examined the water in the creek to see whether there was any current in the creek?

A. Never examined it particularly, unless it was crossing the creek on the bridge.

Q. Did you notice whether there was any current?

A. I think not very much.

Q. Hasn't there been a portion of that ground seeded down that is not now under the plow at all? Take the south half of the section?

A. I don't think there has ever been an acre of it seeded. That is, they have attempted to seed it, but the seed never would grow on it.

186 Q. Isn't there tame grass growing in the south part of the section?

A. There may be some tame grass on that that has not been plowed. Perhaps it is red-top, if you call that tame grass.

Q. Isn't it true that timothy and red-top has been introduced into the land without plowing?

A. I think not.

Q. And that it has caught there and is growing now?

A. I think not. There is not any portion of it that has got any tame grass, except, perhaps, you would call red-top tame grass. It would be very little.

Q. Do you know whether that red-top is natural, or whether it has been sown there?

A. I don't know.

Q. You have never seen it sown there?

A. I have sown red-top and dragged it to see if it would catch, and it never would grow. Attempts made. I think it was the same year that I seeded the whole of it.

Q. About how many acres of this ground is covered by this bordering along the stream with bushes?

A. Well, I couldn't tell: there is quite a number; quite a clump of bushes at different places on the section of willows. There is willows growing along the stream quite a ways, perhaps all the way some.

Q. Some portion of the way it is pretty dense?

A. Yes, sir; on one side, perhaps.

187 Q. Are you able to say in your judgment as to the number of acres covered with willows?

A. No, sir, I am not.

Q. Along the stream?

A. No, sir. I have not taken any pains to look into it.

Q. That's all?

Redirect examination by Mr. GILLET:

Q. How extensively did you experiment as to putting in timothy and red-top?

A. Well, we have seeded the whole amount that was under the plow, and then we seeded, perhaps, five acres that never had been plowed to red-top.

Q. That's all?

The plaintiff then recalled as a witness, J. K. Plumpelly, who testified as follows:

Direct examination by Mr. GILLETT:

Q. Have you made any observations in reference to the water upon this land in dispute?

A. Yes, sir.

Q. How long have you been familiar with that section?

A. Since 1865, about, I think.

Q. Have you had the charge and management of that section since that time?

A. Yes, sir.

Q. Exclusively, until Dr. Gray's purchase?

A. As far as leasing.

Q. You had control of it?

A. I had control of it; yes, sir.

188 Q. Have you constantly been familiar with that section since 1858?

A. Yes, sir; year in and year out.

Q. Have you been over it many times?

A. Yes, sir; a great many times.

Q. Every year?

A. Every year except two years, when I was away in New Brunswick.

Q. What two years were those; since Dr. Gray's purchase?

A. Just before Dr. Gray's purchase I think. I may be in doubt about that.

Q. What changes, if any, have occurred to that section of land since you knew it in 1858?

A. Well, in 1858, I stood where the old corner tree stood; the stump of a tree.

Q. Which corner?

A. The northwest corner. I stood at the foot of that tree, partially a stump. A part of the tree was fallen over on dry land.

Q. At that time, then, where that tree stood it was dry land?

A. At that point; that was a point in the water, a gravelly point. I say 1858. I think that it was that year. That was my first year.

Q. Now, have you been to that point since that?

A. No, sir. I have been in the line of that point, but I couldn't reach that point now.

Q. Why couldn't you reach it?

A. It is in the water now.

189 Q. It is under water?

A. Under water.

Q. Have you been there with a boat?

A. I have passed over the point in a boat. I didn't stop at the point. I guessed about where it was. I looked in shore.

Q. How did you make your observations to know that it was at that point?

A. When I went over it in a boat?

Q. Yes.

A. I took a line with the section—lined the section.

Q. By observing the section line as you passed along?

A. I could see the section line through.

Q. How far from that point, that corner, is the shore now?

A. I don't know. It is some ways. I don't know accurately.

Q. As near as you can judge?

A. I should think it was eight rods.

Q. How is the north shore line of that section as compared with what it was in 1858?

A. It is more curved in—from this point it takes a curve, is wider. I could tell by the willows. In 1858 I followed the shore down, hunting along on the hard, comparatively hard bank, and went in and out between the willows.

Q. Well, has there been a change in the shore line?

A. You can't go there at all now. That is out in the water.

190 Q. State whether the shore has been encroached upon by the water.

A. Yes, sir; it certainly has every year.

Q. Now, then, in reference to the condition of the section—not simply its shore line but the condition of the section generally as to wetness. What changes, if any, have been made since you first knew it?

A. The water stays on it longer. When I first came we used to lease the land to the neighbors to cut by the acre, and I used to go out with Farmer Dunn and survey it out. It was good—what is called prairie land—raised prairie grass, wild red-top, and other prairie grasses.

Q. Go on.

A. We did that for three years, and at the end of three years the neighbors refused to cut any more grass there—buy any more grass there on account of being so wet.

Q. What part of the section was that on?

A. That was from the center of the section towards the south line.

Q. From the center of the section towards the south line?

A. Towards the south line and on the west of the creek, most of it.
Q. On the west of the creek?
A. The larger part of it on the west of the creek?
Q. State whether that land has been growing wet or growing dry.
191 A. It has certainly been growing wet. The water stays longer on it, and when it dries off the ground cracks more than it used to—opens out in large cracks.
Q. That is from the evaporating when the sun comes out?
A. When the sun comes on it, it don't run off as it used to.
Q. What is it that makes the difference in the water not running off?
A. The water seems to stand or back up from the mouth of Taycheedah Creek more than it used to.
Q. So there is no chance for it to flow off?
A. No chance for it to flow off, I suppose.
Q. You are familiar with that section. State whether there are any ravines across it.
A. There is the main ravine that runs from the west line diagonally through the center of the section and spreading out at Taycheedah Creek.
Q. Is that the ravine from Luco, as it is called?
A. No; that is further south than the course of Luco.
Q. You heard Dr. Gray speak of a ravine that runs from Luco to the creek?
A. That is the main ravine, and then there is a ravine from Luco, a natural depression still that runs into that, and there is one through the southwest corner of the land that seems to run into
192 that also.
Q. (Shows witness map marked Exhibit 14.) Take that little bend; put your finger on it, please.
A. Well, there.
Q. That is the bend of Luco Creek then, is it, as it is called?
A. Yes, sir.
Q. Now, then, go back and speak of the ravine which you first spoke of.
A. Well, it is a ravine that comes down here and plows through here, almost touching the railroad, and spreading out in here (indicating).
Q. Now, is that the first ravine south of the gravel road?
A. Yes, sir.
Q. That is the one spoken of by Dr. Gray then, isn't it?
A. That is the one. I suppose so. That is the main ravine there.
Q. Now, where is there another one?
A. There is a little ravine comes in here; that used to be in the spring—used to carry water in the spring.
Q. Where to?
A. Down in this direction. Down in this direction. The water would be there for a day or two. We used to try to go upon it, spreading out here.
Q. Were there any ravines there?
A. There is another ravine there. There is not a ravine that in the spring carried any water.
193 Q. Take the south part of the section, south of the railroad, south of the point which you have just spoken of; are there any depressions in the land there, to your recollection?

A. No; not here.

Q. Where does the water from the south part of the section run to; in what direction?

A. It makes down towards this swale (indicating).

Q. Towards that ravine or swale?

A. Yes, sir.

Q. How are the general features of the land along the creek, commencing at the south line of the section and going along the stream?

A. Well, the shores along the creek here are bold—quite hard shores.

Q. The south end of the creek?

A. The south end of the creek

Q. How is the land on the east side of the creek as compared with other portions of it?

A. The land on the east side of the creek and the north end of it is wet and soaked with water all over.

Q. Outline with your finger.

A. I should judge, judging from the position of the railroad, the water comes to about here. It takes in part of some of the plowed land that we laid out for George White to plow. It was dry.

Q. Then the northeast part of this section off here is lower than the south?

194 A. Certainly.

Q. Where is the drainage of that land on the east side of the creek?

A. The drainage is in the same direction into this swale formed by the spreading out of this creek. The drainage from the east side, I should think, is northwest, and the drainage from the west side is northeast. They seem to come there to the center.

Q. Then the tendency or flowage of that land, of the surface of the water, is in the direction of Taycheedah Creek, isn't it?

A. Exactly.

Q. Near Taycheedah?

A. Exactly.

Q. All tending in that direction?

A. There is no doubt of that.

Q. What did you use that land for when you first came in possession of it?

A. For pasturage and hay.

Q. Up to the time that Dr. Gray became interested with you in the land did you cultivate any part of it?

A. Oh, yes, sir.

Q. You heard as to the breaking that was on the land?

A. It was done under my direction.

Q. When, do you remember?

A. I think in 1859. I won't be sure. I think it was in 1859,

195 and we commenced in the fall of 1858. We marked out the land that was left in the spring from the high water, and then as we got ready plowed that after it was dried off.

Q. You then made the first cultivation on that land?

A. Yes, sir.

Q. Did you do the first fencing on it?

A. No; it was done before I came.

Q. Where did you make that first plowing?

A. On the east side of the section was the first plowing.

Q. And on the east side of the creek?

200 A. We tried what they called a clod-scraper, a sort of a harrow, and we tried seeding it on the sod.

Q. How did you succeed with that?

A. No; that didn't take either. There is no sign of it, and we gave it up.

Q. What kind of crops have you been able to raise on that land?

A. The first crop on that side was a crop of flax.

Q. On the west side?

A. On the west side. The first crop on this side was a crop of wheat and oats.

Q. That is on the east side?

A. That is on the east side.

Q. What result?

A. The first crop on this side?

Q. On the east side.

A. On the east side. I think we got an average of eighteen bushels. That was the calculation. We took pains about an acre on the highest part of it, and part on the lower. It was washed out. That is, it was weak and poor; didn't cut it; let it stand there. The flax crop didn't succeed at all. They said we could grow flax there, because it would probably do, even if there was an unusual wet season.

Q. But you didn't succeed?

A. But they decided it was too wet.

Q. How much of that land have you seen under water at any one time—under standing water?

A. To guess at it?

201 Q. To estimate it, not a simple guess, but an estimate.

A. I think I have seen from ninety to one hundred acres of it under water.

Q. What parts of the section? Just point it out to the jury; describe the outlines of it on the map.

A. From the gravel road; within four or five rods of the gravel road; between there and Taycheedah Creek, and crossing the creek and stretching down into the center of the section. I can only show by the finger; I think it spread out in that form (indicating).

Q. Irregular in shape?

A. Irregular in shape. That is not counting water that I have seen on the north side of the road in those swales, because that is always there.

Q. When was it that you saw that high water?

A. That was in the spring.

Q. About what year?

A. I saw that the last spring. I took more notice of it last spring.

Q. This last spring?

A. No; the year before this. I was not here last spring.

Q. 1875?

A. 1875. 1875 I went around it with Bigford. I think it was 1875.

Q. How long did that water stand on there?

A. I don't know.

202 Q. Where did it come from?

A. It came out from the creek; backed up from the creek. We went over part of it in a boat. We followed the current from the creek.

Q. Point out on the map where you went with a boat.

A. We came up here. We put in at the bridge that crosses the creek at Taycheedah and followed up the creek and came out in the prairie,

and followed the current up to the end where the highest land was. In the water where the current stopped I followed it back to a sort of pond or lake, a little lake formed in there, because we speared some pickerel there. It seemed to lie there. There was no current there. It seemed to lie there dead. There was where they collected in the still water.

Q. How long did that water remain there on the premises?

A. I don't know. I went down there in the course of two weeks three times a fishing.

Q. The water was still there?

A. The water was still there.

Q. To what extent?

A. For this two weeks? I should say nearly about to that extent—to that extent.

Q. What time of year was it?

A. It was just as they were beginning to plow. It was in April; late plowing.

203 By Mr. POTTER:

Q. I didn't hear your last remark.

A. It was in April, the early part of April.

By Mr. GILLETT:

Q. Well, have you seen that land under water in that shape more than that once that you spoke of?

A. I have seen it that way every year, but not to so great an extent, except this spring. This year *this year* there is a greater extent of water.

Q. Than there was last year?

A. Than there was last—that is, at a later time in the year.

Q. How do you know that fact?

A. I have been down there. I went down there with Mr. Newton to trace it out. We drove stakes to show where it was.

Q. Where did you drive the stakes there?

A. We drove the stakes there at the edge of the water, and I pointed out to him those swales, or little lakes that we called them, and told him that there were additional ones, and we droves stakes down there.

Q. When did you drive the stakes?

A. I don't know the month. It was in the summer.

Q. Of the present year?

A. Of the present year. This summer I made a note of it in my book. I don't remember.

204 Q. You have not got your memorandum with you?

A. No, sir. I left it to Mr. Newton.

Q. Do you remember the season of 1866? Do you bear that in memory distinctly, or don't you?

A. No; I don't; not as 1866.

Q. Well do you remember a year of extreme high water before?

A. Before this year?

Q. Before this year and last year.

A. Yes, sir; I do.

Q. Do you remember how long ago it was?

A. It was when Mr. Geisse was living. We talked it over. I think it was about eight years ago.

Q. Somewhere about that time?

A. I think so.

Q. What was your observation as to the water on that land that year to which you refer—the year of the high water?

A. I went with Mr. Geisse over and asked him if he didn't think that the water was increasing, and said that I thought it was increasing.

Q. You are not permitted to give your conversation.

A. I say I thought it was increasing.

Q. What did you observe in respect to high water that year?

A. Well, I don't know how you mean.

205 Q. How did it compare I mean with the high water this year or last?

A. It didn't stay on the land as long as the water now, this year; that I know.

Q. I was asking you about the extent of it.

A. It spread over about the same line; over the same amount of land as I have marked out there before. Took the same course.

Q. Just put your finger on the map there and indicate where that reserved acre and a half of Fountain's and Dunn's is; whether it is on high land or low land.

A. It runs along the line and joins in at that corner.

Q. Right on the gravel road?

A. Right on the gravel road.

Q. And on the west line of the section?

A. And on the west line of the section.

Q. And on the north side of the road?

A. And on the north side of the road.

Q. There was another lot reserved?

A. Twenty acres to Mr. Nightengale.

Q. That is the 20 acres in the southwest corner?

A. This down here.

Q. That is all high and dry land in the southwest corner; that twenty acres?

A. That twenty acres extends over into the beginning of this swale land.

Q. That is the south half of the southwest quarter?

206 A. Yes, sir.

Q. The Nightengale tract?

A. Yes, sir; that is the best land he could find when he bought it.

Q. I notice on that land, the lower right hand corner, a mark as though the creek had two arms or streams. What is that mark on the further side of the ditch?

A. That is a ditch. That is a ditch that we dug there to carry this water off into the creek.

Q. Running from the southeast corner of the section to the creek?

A. Running from the southeast corner of the section to the creek.

Q. Trace it with your finger, so that it can be seen.

A. That is the ditch (indicating).

Q. Is that ditch of any service now?

A. No; it carries off some surface water to a certain hight in the ditch and it stands there. It has no run-off.

Q. Are you unable to tell where the line of the back-water in that creek is?

A. The line of back-water has increased.

Q. Answer my question.

A. Where it is now?

Q. Where it is at any time?

A. No.

Q. You could tell if you looked?

A. Yes, sir; I could tell if I looked.

207 Q. How far back up the creek does the dead water stand—has it stood—to your knowledge?

A. It stands nearly half way through the section. A line half through the section would about extend where the dead water stood last year. I have not seen it since.

Q. Is your calculation right about the half of the section?

A. About here, as it looks to me.

Q. You know where the quarter line is, north of the railroad?

A. Yes, sir; I can judge better now by seeing the railroad. I thought this was the line of the section.

Q. About what proportion of the section, across the section, did the back-water stand last year?

A. Why, the back-water stood within a few rods of the end of this ditch, and this ditch runs across a forty-acre lot.

Q. Very well; then it is the eight' line, instead of the quarter line?

A. Well, that is all I know. That is the way I know, and the only way.

Q. Then it would be about three-fourths across the section?

A. I should think it did, taking a straight line across the section.

Q. How is it this year?

A. I don't know. I didn't see it this year.

208 Q. I thought you observed where the back-water stood now?

A. When I went down there the back-water was away beyond the ditch. The water was very high then.

Q. When did you go down there?

A. I went down in the summer, when I went down with Mr. Newton.

Q. Not the present year?

A. Not the present year.

Q. Where was the back-water then?

A. The back-water was beyond the ditch.

Q. South of the ditch?

A. South of the ditch.

Q. How far south?

A. Not very far south; perhaps two rods south.

Q. What do you mean by back-water?

A. I mean that point in the water where the current from the lake ceases—any current in the lake ceases.

Q. Where the current in the stream ceases?

A. Where the current in the stream ceases; where it begins to spread over the land.

Q. Do you remember when that ditch was cut there?

A. I don't remember the year, although I was there. It was cut by Mr. Burhite, with his machine.

Q. Quite a number of years ago, wasn't it?

209 A. It was in the sixties—some in the sixties—before 1870.

Q. What is the soil of that section; general surface soil?

A. It is black loam; black prairie soil, we call it.

Q. Do you know what the subsoil is?

A. The subsoil is a clay.

Q. Do you know what depth this vegetable mould ceases on the surface as a rule; have you done any digging to demonstrate?

A. We got a plow especially for turning over the sod. The subsoil was from a foot and a half to two feet down, and we didn't reach it.

Q. That is, clay?

A. The clay. We didn't reach it.

Q. On what part of the section was that?

A. That was on the east side of the section and part on the west side of the section.

Q. On both sides of the creek?

A. On both sides of the creek.

Q. Some of the witnesses spoke about plowing, and the water in the furrow. Do you know anything about it at any time?

A. I have seen the water follow in the furrow. That was when we began plowing pretty early; when we approached these swales, when we got within the radius of those swales, the water would follow back in the furrow down at this end here—this end of the plowing, towards the railroad.

210 Q. What crops did you try to raise on the section besides that flax?

A. We tried rape, we tried wheat and oats. One man who leased under me tried corn. I didn't.

Q. Those different kinds of crops have been tried in different years?

A. In different years. The wheat and oats were tried the same year, of course.

Q. You have wheat more than one year and oats more than one year?

A. We tried the wheat every year that I had it; we tried the oats every year. The wheat wouldn't fill.

Cross-examined by Mr. POTTER:

Q. In what year was the first plowing done on this section?

A. I think it was in 1859—1858 or 1859.

Q. The next year after you knew the premises?

A. It may possibly have been done in 1860, but I think in 1859.

Q. On what portion of the section was that plowing?

A. Between 35 and 40 acres on the east side is all that I remember that was plowed that year.

Q. What kind of a crop was put on it?

A. There was wheat and flax.

Q. Under whose direction and by whose authority was this plowing done and the cropping?

A. Mine.

211 Q. Prior to this plowing of the land and sowing it what use did you make of it?

A. Hay and pasture.

Q. The whole of it?

A. The whole of it.

Q. Had you been using it then for pasture and for haying purposes from the time it was purchased by your father down to the time this plowing took place in 1859 or 1860?

A. From the time it was fenced.

Q. When was it fenced?

A. I don't know. I think it was fenced perhaps three years before 1859 or 1858.

Q. Either 1855 or 1856?

A. 1855 or 1856 it was fenced, I think.

Q. And prior to that time after the purchase and up to that time it had been commons, had it not?

A. Yes, sir.

Q. What kind of land was it at that time when it was laid open to commons?

A. I wasn't here; I don't know.

Q. You don't know anything about it?

A. They used to cut hay on it.

Q. Well, after this crop was raised on the east side of the creek, where was the next plowing done and when?

A. The next plowing was done the next year, I think, on the west side, beginning at the gravel road. Plowed a piece in there between the gravel road and where the railroad is now. There was no
212 railroad then. On what was considered the highest land, somewhere during the summer, a little south of the middle of the section.

Q. That is the piece that has been identified here by some of the witnesses as having corn and potatoes on it?

A. Yes, sir.

Q. That was done, you think, the next year?

A. Yes, sir.

Q. About how many acres?

A. I think about 60 acres—from 60 to 80 acres, I think.

Q. Now state whether from 1859 or 1860 down until the present time this land that you say was plowed has been cultivated every year.

A. A part of it; yes, sir.

Q. What portion of it?

A. The best part of it.

Q. Well, designate on the map, if you can, what portion of it has been plowed and cultivated every year.

A. The south part—the southerly part, I may say—and the forty acres on the east side of the creek.

Q. That would be on the northeast quarter of the section?

A. The 14 or 16 or 20 acres south of the gravel road, and between there and the railroad.

Q. State whether that portion on the east side of Taycheedah Creek is on the northeast quarter of the section.

213 A. No, it is not. It comes to the northeast forty. It is the north part of the northeast quarter of the southeast quarter.

Q. Of the southeast quarter?

A. Yes, sir.

By Mr. GILLET:

Q. You said it come to the northeast forty.

A. No; I mean that there was a little more than forty acres between the south line and the south end of the plowing.

By Mr. POTTER:

Q. Is there any portion of this land that was broken up in 1859 or before on the east side, on the northeast quarter of this section of land?

A. I should think there was a part of it; yes, sir.

Q. That breaking extended over to the southeast quarter of the section one?

A. Yes, sir; right in between.

Q. So that the whole breaking was not on any one particular forty?

A. Not on any one particular forty.

Q. A portion is on the southeast quarter?

A. I think the section would run about nearly through the middle, the quarter line.

Q. What have been the kind of crops that have been put on it from year to year from that time down?

A. Generally oats and wheat.

Q. Oats and wheat?

214 A. One year we tried a crop of corn.

Q. Is'nt that corn this year?

A. That I don't know; Dr. Gray has had it.

Q. Wasn't there corn raised there last year?

A. I don't know that either.

Q. Are you a practical farmer?

A. Hardly—an amateur.

Q. You have raised grain?

A. Yes, sir.

Q. And corn?

A. And corn, wheat, and oats.

Q. Tell me which will shoot the root furtherest into the ground, corn or wheat?

A. Wheat.

Q. Which takes the deepest root?

A. Wheat.

Q. That is your experience?

A. I think corn lives on the atmosphere more than wheat.

Q. You think that the wheat root goes deeper than the corn root?

A. I do, the main root.

Q. Which goes the deeper of the two, a corn root or an oat root?

A. I don't know. I should be inclined to think the oat approached wheat more than corn in its main root.

Q. You think the root of an oat goes deeper into the soil than corn?

215 A. I think so, yes, sir; one root. It throws out one root. Corn spreads out to support the stalk and looks bigger, but I don't think it goes down so deep into the subsoil.

Q. Isn't it true that you can raise a better crop of oats on a piece of land where the water comes nearer to the surface than you can a piece of corn on the same land?

A. Possibly, but then it would not fill.

Q. How do you account for that, then, if the oat-root goes deeper into the soil than the corn-root?

A. I think the oat might incline more to the nature of rice, and it will grow nearer water; anyway oats will, than corn, without reference to the soil.

Q. You say last year the water came up to this land and came up this big ravine that you speak of south of the gravel road and covered a space of about somewhere in the neighborhood of a hundred acres?

A. I think so; yes, sir. I should guess about one hundred acres.

Q. And that there was a greater quantity of water then standing on the ground that year than you had ever seen before or since on that land?

A. I thought so; yes, sir.

Q. I mean south of this gravel road.

A. I thought so. At that time of year I said I think——

216 Q. At the time you spoke of, I think it was the fore-part of April, 1875.

A. Yes, sir.

Q. A year ago last April?

A. Yes, sir.

Q. You stated, if I understand you correctly, that the water came up Taycheedah Creek, set up this ravine, or swale and covered in the neighborhood of 100 acres; that there was more water then on there than you had ever seen before or since.

A. At that time I meant.

Q. At that time of year?

A. Yes, sir.

Q. What is the fact; when has been the highest stage of water in Taycheedah Creek; what season of the year?

A. Generally it is the breaking up of the ice in the spring.

Q. Has there been any year when the water has been higher in the summer than in the spring?

A. I think this year. I don't know, but I think so.

Q. You don't know that fact?

A. The levels will show at the stake. I think a little higher this year than it was in the breaking up in the spring of the ice.

Q. You think it was higher in the summer this summer than it was a year ago this spring at the breaking up?

217 A. Yes, sir.

Q. When you speak of this large quantity of water being there?

A. Yes, sir.

Q. State whether this ravine or swale that you speak of was full of water at the time that you say the water set back in April a year ago.

A. I should think it was. I should say it was full of water.

Q. Was it so full as to run free?

A. It was so full as to spread over land that it had not before.

Q. It filled the ravine full so it run over the land adjacent, if I understand you?

A. Yes, sir.

Q. Is there an outlet to that ravine?

A. Yes, sir; there is a creek what we call Taycheedah Creek.

Q. That is the natural outlet is it?

A. That is the natural outlet undoubtedly.

Q. State whether it is not a fact that the ravine is lower near its intersection with Luco Creek, or a little swale that passes out there, or a bayou, than it is at Taycheedah Creek?

A. Probably the same level; I don't know. There is a little ridge between.

Q. I asked you to state whether you know, or whether you are willing to swear, that it is higher at that point in this swale near

218 Luco Creek. I understand that it comes up there near to Luco Creek.

A. Yes, sir.

Q. Will you swear it is higher at that point than it is where this swale intersects Taycheedah Creek?

A. I should say it was higher near that point, but not at the point.

Q. Will you swear that the ground is higher there at the swale at Luco Creek than it is down there at the intersection of this swale with Taycheedah Creek?

A. No; I won't swear that, of course, but at the two points I should say not. Near there it is higher.

Q. How near?

A. How near to Luco Creek?

Q. How near to Luco Creek will you fix the point that is higher than at the point where this swale intersects Luco Creek?

A. I should say eight rods east; something like that.

Q. Eight rods east?

A. Eight rods east.

Q. What is the difference in the elevation between the land where this ditch that you speak of intersects Taycheedah Creek and the point where this swale intersects Taycheedah Creek?

A. Do you mean the top of the ditch or the bottom of the ditch?

Q. I mean the surface of the soil—the top; take the surface
219 right where the ditch intersects Taycheedah Creek and take the surface of the swale where it intersects Taycheedah Creek

A. I think it is twenty-six inches higher by measurement.

Q. What is the distance?

A. Well, it is across an eighty and part of a forty.

Q. An eighty would be 160 rods and a part of a forty would be about 200 rods?

A. Yes, sir; between that and 160 rods?

Q. If I understand you correctly, you state the surface of the land is higher at the point of intersection with this creek—twenty-six inches higher than it is down at the point where this swale intersects the creek?

A. Yes, sir; the general land. The ditch was dug through the lowest point of land that could be found, of course.

Q. You take the general average, I suppose?

A. Yes, sir.

Q. How much higher is the ground immediately south of the main stream that you speak of than the bed of the swale?

A. I don't know; it is higher.

Q. How much should you think?

A. I should think it was between a foot and a foot and a half.

Q. In 1875 you stated that the water went up Taycheedah
220 Creek, or in other words that you found dead water in Taycheedah Creek at least to the center of the section?

A. Yes, sir.

Q. And this summer when you was on there you found dead water up to where the ditch intersects the creek?

A. Yes, sir; and above it.

Q. Do you know what the stage of the water was in the lake at those two times?

A. If you will allow me. That is to say at the time I mentioned that it was higher than it was in the spring before. In the summer.

Q. One time you looked at it in the spring of 1875, and the other time you looked at it this last summer?

A. Yes, sir.

Q. Now, I ask you if you know what the stage of water was in the lake at those two times?

A. The water was higher to me—seemed more water in it.

Q. I asked you if you know?

A. No.

Q. You kept a memorandum or some record, did you not, of the stage of the water at Taycheedah Creek?

A. Yes, sir.

Q. That record you have not got with you?

A. No, sir.

Q. Did you make a memorandum of the stage of the water at

221 the point where kept—the stage of the water on Taycheedah Creek—in the fore-part of April, 1875, when you saw this water standing on the land there?

A. No, sir.

Q. You made no record?

A. No, sir.

Q. Did you make any record of the stage of the water at the point in Taycheedah Creek where you kept a record this last summer when you saw this water standing on the land, and the water set back up above this ditch.

A. No, sir; I didn't. I was with Mr. Newton and left it to him.

Q. What was the nature of the record that you kept? How often did you keep it?

A. From year to year.

Q. What particular season?

A. I think I can find three. On the breaking up of the ice the water standing was half way up the swale, we used to call it.

Q. How often did you make your observations and make your record during the season?

A. I made no other record except what I remember.

Q. Except in the spring?

A. No record in a book.

Q. Had there been any tame grass introduced into the southern portion of that section?

A. We made the effort. That was when we tried to scratch in some tame grass.

222 Q. Is there any tame grass growing there?

A. No, sir.

Q. Have you been upon the premises and examined to know?

A. Well, I was there last year. There was none there last year.

Q. When did you make this effort to get in some?

A. The year before Dr. Gray bought it.

Q. Do you know whether there is any red-top growing there or not?

A. There is no red-top growing there. This June grass they call red-top. There used to be a little red-top growing there.

Q. Well, isn't there some growing there now?

A. No; I don't think there is. I don't think there is a bit, but there may be.

Q. Don't you know that there is not any grass growing upon those premises except what you call this wild prairie grass?

A. I should be willing to swear that there was not.

Q. No tame grass of any kind?

A. No tame grass of any kind.

A. No red-top, unless it was a spear or two along the wagon track.

Q. I don't mean that.

A. No, sir; I will swear there was not.

By Mr. GILLET:

Q. No quantities?

A. No, sir.

223 By Mr. POTTER:

Q. Have you been upon that tract recently, within a few weeks?

A. No; not since I was there in the summer with Mr. Newton. That is, over the tract, you mean.

Q. John Bannister was a surveyor?
A. Yes, sir.
Q. Lived here?
A. Yes, sir.
Q. And you took it from a map made by him?
228 A. I don't know whether it was from a map or from what source, but it seems from the minute on there, and so on, that I got it from his survey somewhere.
(Objected to unless it appears that this map was made from the government field-notes. Objection overruled, to which defendant excepted.)
Q. What is the n ext line lower down?
A. The line of the lake shore as I found it when I made my survey in 1872.
Q. Now, then, what are those other figures on the map?
A. The hights of the ground above the level of the water as I found it in February, 1872.
Q. So that that map shows by its figures the relative elevation above the water of the lake in February, 1862?
A. 1872?
Q. 1872?
A. Yes, sir.
Q. How were those figures ascertained?
A. By a level.
Q. How did you take your levels?
A. With an engineer's level and rod—the usual method, I believe, of running a level.
Q. Is that Luco Creek marked on the west side there?
A. Yes, sir.
Q. Take those figures—take the center of the section right
229 through there indicated on the map—and state what you found the elevation to be?
A. On that line?
Q. Yes, sir; that is about the center of the section, isn't it?
A. That is not far from it.
(Objected to as immaterial until the witness has shown the stage of water at the time the survey was made.
Objection overruled, to which defendant excepted.)
Q. What did you find, beginning at the left land?
A. Twenty-six one-hundredths feet above the water at that time; that would be 660 feet east of the section line.
Q. Commencing at that point?
A. Commencing at that point.
Q. Twenty-five one-hundredths feet would be three inches, would not it?
A. Yes, sir.
Q. And those figures are in hundredths of a foot?
A. Yes, sir.
Q. So, then, that first figure is about three inches above the water as it stood in the lake at that time?
A. Yes, sir.
Q. What is the next figure?
A. 1.04—a foot and four one-hundredths.
Q. That is practically one foot?
A. One foot and half an inch.
Q. What is the next one?
230 A. The next one is 1.55.

Q. That is practically a foot and a half?
A. Yes, sir.
Q. Go on.
A. The next ninety-five one-hundredths, practically nine inches. The next 44 one-hundredths.
Q. That is less than six inches?
A. Less than six inches. The next one 1.52. The next one is on this map; it skips over to the third. Two rods—one beyond that—as this shows 3.19.
Q. East of the creek?
A. East of the creek. The next one is 2.49, 1.54, 2.75. The next one is 2.93, and then the next one would be something like 200 or 300 feet north of the center of the section, and on the east side, which is 2.20.
Q. How far apart are those figures north and south?
A. A hundred feet.
Q. So that you have the level there every one hundred feet running north and south?
A. I take them at that, and on that other map they show so.
Q. Where is the highest land on that section?
A. From the best of my recollection the highest is in the southeast part of the section. The figures don't indicate, but from the best of my recollection the southeast part is the highest.
Q. Do you remember what those figures were on the southeast part?
231 A. I don't recollect positively; I think somewhere in the vicinity of twelve or thirteen feet.
Q. You are mistaken about that; it is nine and something. Of course it is a mere matter of recollection.
A. Well, I may be.
Q. What is the character of that land immediately south of the gravel road and near to it, as to elevation?
A. A part of it, immediately close to the road, is gradual; right close to the road is nearly of the hight of the road, and some of it sloped off very quick from the road.
Q. Which way?
A. South; some of it very quick, and quite a considerable amount of ground is but a little above the level of the water at that time, or was but a little above the level of the water at that time.
Q. Can you tell there from those figures what the depression in the ground is upon the line of the gravel road; by looking at those figures along the line of the gravel road and those figures below it along the ravine, what can you discover?
A. Well, the most of its way it runs from two and a half to five feet.
Q. Difference in elevation?
A. Yes, sir.
Q. Take the line there on the map, as near as you can recognize the line of the ravine, and give the figures showing the hight of
232 the bottom of the ravine in reference to the surface of the water at that time, in February, 1872?
A. The figures along the sheet lays part of the ravine around on this.
Q. Why are they not on?
A. I think this was made to show about where high water was at that time, or along in April. I think this would show about high-water at that time. I think that these figures represent the hights of

the ground above the water—above the high-water I guess in April afterwards.

Q. Not in February?

A. I don't. When I come to think, the other map—I think, represents the hight of the ground from the water in February, and this I think is the difference in the level of the ground above the water at high water in April, when the water was high; because, if my recollection serves me right, this line through here was intended to be somewhere near the flow of the current at high water, and the figures would represent the ground above that water, because if it did not—if it was not that—why the ground inside of this, where the elevation is, would be below the water.

Q. See if you have any minus marks there?

A. No; I think not. I don't see any.

Q. So there are no figures there to indicate where or how much?

A. I didn't notice this minute before on the map—red line high
233 water, 1846. Figures express the hight above high water in 1866.

Q. Have you been wrong in both statements before?

A. I didn't notice it before. I have been wrong; yes, sir. The relative hights. These distances were the hights above high water in 1866, and how much difference there is between that and the other map there is nothing on here to indicate.

Q. That map, then, indicates the hight in reference to the high water of 1866 instead of 1872?

A. Yes, sir.

Q. As shown by the map itself?

A. As shown by the map itself. I didn't see it before.

Q. (Shows witness another map.) That is only another representation of the section?

A. That is all.

Q. That indicates the line of the Sheboygan road?

A. Yes, sir.

Q. That is the bend in Luco cove or creek?

A. Yes, sir.

Q. That is the gravel road?

A. Yes, sir.

Q. And this is Taycheedah Creek?

A. Yes, sir.

Q. And these the outlines of the section?

A. The outlines of the section.

Q. I notice on that map there is no section corner—no northwest corner to this section?

234 A. I tried only to line up as far as the water was at the time I made the survey for this map.

Q. Do you know the distance from that quarter-line there to the actual corners?

A. I think some two hundred feet.

Q. Could you tell by this scale if you measured?

A. That is only from a recollection of the minutes on my field-notes, but I think it is something like about two hundred feet.

The plaintiff then called as a witness E. P. RADFORD, who, being duly sworn, testified as follows:

Direct examination by Mr. GILLET:

Q. What is your business?

A. Civil engineer and surveyor.
Q. Is this map that I hold in my hand, marked Exhibit 16, your work?
A. Yes, sir.
Q. What does that purport to show?
A. It is a plat of section one, town. 15, range 17.

By the COURT:

Q. The whole surface of it?
A. The whole surface of section one.

By Mr. GILLET:

Q. What does that south line running nearly east and west indicate?
A. It indicates the Sheboygan & Fond du Lac R. R. crossing the section.
Q. What does the other double line running north and south indicate?
A. That indicates the Taycheedah gravel road crossing the section.
235 Q. And this north and south crooked line?
A. It indicates the Taycheedah Creek as it passes over it.
Q. What do these figures indicate?
A. They indicate the surface of the ground above or below the level of Lake Winnebago, taken at a stage of twenty-six inches on the water-gauge established at Dutchman's mill at Menasha.
Q. At a twenty-six-inch gauge on Dutchman's mill at Menasha what would be the stage here?
A. Well, it would be twenty-six inches on the gauge we have established here—the gauge here at the same relative hight as that at Dutchman's. The zero of our gauge corresponds with his.
Q. Explain that gauge.
A. The gauge is a graduated scale or board set to some stationary object, and ratching down into the water as though it was nailed up and down to this platform or standard, and the water rises and falls on this graduated scale, and it is divided into feet and inches, and a record is taken of each day as to where it stands on that gauge. Of course, the gauge is stationary, and the water rises and falls.
Q. So the gauge is a stick marked with figures indicating feet and inches upon it?
A. Yes, sir.
Q. Your zero mark would be the level of the water in a settled stage, wouldn't it?
A. No.
236 Q. Well, then, what?
A. Zero mark is indefinite. I don't know what they did have for such a zero mark at the time they established the gauge at Menasha. We simply established our zero point to correspond with theirs.
Q. So that when the water was level in the lake, and the water indicated any particular point on their gauge, you fixed your gauge here so that it indicated the same mark?
A. The same figures exactly.
Q. Then the gauge would indicate the changes in the water?
A. It is the level of the water at both points.
Q. Now, then, this map Exhibit 16 indicates the stage of the water and the elevation of this land at a stage of water corresponding to 26 inches on the gauge?

A. Yes, sir.

Q. That would be 26 inches on their gauge?

A. On their gauge.

Q. Now, then, what have you put to indicate or show the actual stage of the water upon any surface or fixed mark on the land?

A. I hardly understand your question.

Q. Well, if there was 26 inches of water on the gauge, what object would it touch on the lake shore? Have you anything to show that?

A. We have no object that I know of particularly, except this water-gauge that we have established.

237 Q. How do you know this is high-water or low-water?

A. I simply know that from the testimony and partly from my own observation on the gauge here, and from testimony I believe Mr. Dutchman gave on this trial. If I was rightly informed he testified that 26 inches was an average high stage of water.

By Mr. POTTER:

Q. An average stage of water?

A. Average high water I understood.

By Mr. GILLET:

Q. What do you understand to be the stage of water at 26 inches on the gauge?

A. As far as my observation has been it is an average high stage of water. I have seen it considerable higher, and I have seen it a good deal lower, but it sets at 26 inches longest at high water.

Q. During the summer?

A. During the spring, May, June, and July.

Q. So, according to your notion, then, a fair average high-water in the spring would indicate 26 inches on the gauge?

A. I think so; yes, sir. That is the stage of water at which the water stands for any great length of time. Sometimes goes considerable higher, but goes off within a short time and settles about that

238 stage, sometimes an inch or two below and sometimes an inch or two above.

Q. Now, then, that stage of water would rise in high-water?

A. In high-water; yes, sir.

Q. And it only goes off from that hight by evaporation or use by discharging at the Neenah and Menasha dam?

A. I think that is the only means by which it decreases in hight, being discharged at the Neenah and Menasha dam, or by evaporation.

Q. How much above this 26 inches on the gauge would be high-water; that is, about how high above does it come?

A. We have seen at as high as 25 inches above; again so that it would read 51 inches on the gauge here, but that was last—I think it was in July. I was away at the time, but a person made a mark down there and by comparison with the gauge I found it read 51 inches, but that was in high-water with a very strong north wind which blew the water from the lake into this end of the lake and registered 51.

Q. Is that the highest register that you have known of?

A. That is the highest register that I have known of; yes, sir.

Q. Suppose that is the surface of the water, and it raises up on your gauge twenty-six inches; (indicating).

A. Yes, sir.

239 Q. That would indicate a similar raise of the water from that stage to a twenty-six-inch stage?

A. Yes, sir.

Q. Then you have seen it register above that 25 inches more?

A. Twenty-five inches more. In the first place I never have seen it below zero. I never have seen it below thirteen inches.

Q. I am speaking of the operation?

A. The operation would be lifting it right up to that point. The operation is that it lifts on the gauge, and the lifting on the gauge indicates the rise of the water.

Q. How low have you seen it.

A. I have seen it as low as thirteen inches.

Q. Now you have seen it as low as thirteen inches, and as high as fifty-one inches—that shows the range of high and low water?

A. Yes, sir; extremely high and extremely low water.

Q. About thirty-eight inches?

A. Thirty-eight inches.

Q. Three feet and two inches is the range of the water as measured on the gauge?

A. Yes, sir.

Q. Now, twenty-six inches on the gauge being the level settled state of high water in the spring, will you state from that what changes
240 are shown on this land? As I understand, you made these figures by which you compare the elevation of this land with that settled stage of high water in the spring at twenty-six inches on the gauge (map marked 16).

A. Yes, sir.

Q. What are the general features in the first place of that section in respect to ridges or ravines? Do they run easterly or westerly or northerly or southerly?

A. Well, the ravines or swales ordinarily, they are running east and west—the water-courses. The creek runs north and south.

Q. The water goes in the creek?

A. The creek itself runs north and south; the swales run east and west.

Q. Then the water-shed, the flowage on the section, is in a tendency to the eastward or northeastward, making for the creek? Isn't it on the west side of the creek?

A. No, sir; I think not. I think the water-shed is the other way.

Q. Indicate it then?

A. I think the water-shed from here goes west.

Q. From where?

A. From about this point or pretty close to the creek here—moves west and goes down into Luco Creek.

Q. These figures, I suppose, will indicate that?

A. Yes, sir; we have an elevation of twelve feet and forty-six one hundredths.

241 Q. At what point from the west line on the side of that section do the waters flow westward or northeastward?

A. At what point on the western line of the section?

Q. Yes.

A. I don't think there is any point.

Q. Then what do you mean by that the waters flow to the west instead of east?

A. I think they do from the western part of the section. There is a dividing ridge in here from where the waters go into the creek.

Q. Where do you mean?

A. It runs right along the west bank of the creek until you get up—well, just south of the railroad—then it commences to trend to the north-

ward into a ravine or swale, and from about this point it runs into the creek, so that there is a part there that drains in it. The balance drain, down into the creek, and from a ditch on the west side of the sections and comes into Luco Creek about that point, (indicating).

Q. Now, then, take the line of the Sheboygan road and give me the elevation of the surface of the land as compared with the water at 26 inches on the gauge, being the settled stage of high water in the spring?

A. Probably you had better take one station back or one station ahead of that point.

Q. Why?

242 A. For the very reason that some of these stations may come on the grade-ground and not show the natural situation of the ground.

Q. Take it?

A. 2.05, 3.40.

Q. 2.05 what?

A. 2 feet .05.

Q. Above what?

A. Above the level of the lake at average high-water stages.

Q. How far from the line of the track?

A. That is 100 feet south of the line of the track.

Q. It would be outside of the grade?

A. Yes, sir; not disturb the grade.

Q. Go on.

A. Then we came to 3.40, which would be three feet five inches.

Q. How far is that south from there?

A. That station is twenty rods further east.

Q. These figures are every 20 rods east and west?

A. Every twenty rods east and west and every hundred feet north and south.

Q. What is your next station?

A. 3.73, which would be three feet nine inches.

Q. Go on.

A. The next is 3.99, just four feet, less a little.

Q. Go on.

A. The next is 4.16, four feet two inches; 4.84, four feet ten inches. Next, 3.33, three feet four inches. Next, 320, which is three feet

243 two inches. Next, 3.80, three feet nine inches. Next, 3.38, which is three feet four inches or four inches and a half. The next is 3.64, which is three feet and eight inches. The next is 5.22. We have crossed the creek now. About fifteen rods east of the creek is 5.22, just five feet and a quarter, five feet three inches. The next is 4.39, four feet three inches and a half. The next is 2.33, that is two feet four inches; 1.93, that is one foot eleven inches. The next is .71, a trifle less than nine inches. On the section line it reads 1.69, which is a foot and eight inches.

Q. Next take the stations midway between the railroad and gravel road from Luco Creek here.

A. We started at that point forty rods east of the section line. We find an elevation of .25. That is in the bottom of the ravine or swale.

Q. That is three inches?

A. That is three inches; and the next elevation we find is 1.02, that is about one foot.

Q. Showing a little rise in the elevation?

A. Showing a little rise in the elevation. The next elevation we find

by going north. The ravine makes a curve there—is 1.60, that would be a foot six and a half inches.

Q. Wait a minute, right there at that point. You are giving the elevation of that land above this settled stage of water in the spring, are you not?

244 A. Yes, sir.

Q. Go on, now, further east.

A. The next east line, the lowest elevation we find, is 3.07, which is three feet one inch. The next lowest elevation is 2.06; then we find 1.60, that is one foot eight inches; 1.50, a foot and six inches; 1.04, that is one foot and half an inch; 1.02, and at that point the ravine goes into the creek. Then we find higher ground, 3.18, three feet two inches; 3.80, three feet nine inches.

Q. This ravine bears to the south?

A. It comes in here and spreads out to the creek.

Q. Aside from the line which you have just indicated, where are the lowest points on that section?

A. The lowest points?

Q. Not the very lowest.

A. There are two low spots—one is in the northwest corner of the section, and the other is in the northeast. One is at the outlet of Taycheedah Creek in here, and the other is on the lake shore on the banks of Luco Creek.

Q. Those are the points where it is the lowest land on the section?

A. The lowest land; those are the lowest lands.

Q. I mean in any considerable quantity?

A. The lands in the northeast quarter are the lowest, the most of them, just at the outlet of Taycheedah Creek.

Q. Now, then, we can study that out for ourselves, if you ex-

245 plain it a little to us. If I want to find the elevation of land at any particular point here I have simply to look at your figures?

A. Yes, sir.

Q. And that will give the relative elevation of that land as it corresponds with the hight of the water at the stage which you have mentioned?

A. Yes, sir.

Q. Now, then, just show us what will indicate to the jury the minus marks.

A. The minus marks are a dash placed before the figures. In running down this line north here, 1.78, —.94, then we come —36 (minus 36), which would be minus 36 —4 inches below the stage of the water at that time.

Q. The other marks are above that stage of water and the minus marks are below?

A. Are below; yes, sir.

Q. I notice that the north line of that section is not a full line?

A. Well, it never was a full line. The north line was five chains less than half a mile long originally.

Q. Point where the line was.

A. The line came to this point here.

Q. From where?

A. From the northeast corner going west to this point.

Q. Then striking the water?

A. As it intersects the lake shore.

Q. Where was the other corner?

246 A. The other corner was in at that point.
Q. Where did that line run from there; how far up?
A. The line from there came down into the section.
Q. That is, between those two points there was a curve in the lake shore?
A. There was a curve in the regular line of the lake shore.
Q. How far is that northwest corner now out in the lake?
A. At the time of my measurements I made twenty-one rods and a trifle over.
Q. That was originally on hard land?
A. The field-notes would indicate that.
Q. There was a bearing tree, wasn't there, there?
A. The field-notes called for a bearing tree at that point.
Q. Have you got those field-notes?
A. Yes, sir; I have got some that we sent to Madison and got.
Q. I am afraid you have got mine instead of yours.
A. I guess not.
Q. Let me see those field-notes.
(Witness produces field-notes.)
Q. Here is that section one?
A. Yes, sir.
Q. By the field-notes of the original government survey, how much land was there in that section?
(Witness refers to field-notes.)
A. 590 acres.
247 Q. In your survey, as indicated by your map, did you ascertain the present quantity of the section?
A. I found it to be 14.34 acres, I believe, short of that quantity.
Q. That is all the land that is actually washed away?
A. Yes, sir.
Q. Now, when was your map made?
A. It was made in January of this year.
Q. This present year?
A. Yes, sir.
Q. Do you know from your map how much of that land is covered by high water—extreme high water?
A. I don't.
Q. You have not made your calculations?
A. I have not made my calculations to that effect.
Q. Have you made a calculation as to how much land is covered with water at any stage of the water?
A. Yes, sir.
Q. What was that calculation?
A. I made a calculation as to the quantity, as to the amount of land that was at or below or to within one foot of the level of the water. That is all the lands that were below one foot of the level of the water at the stage of twenty-six inches, and I found there was 24.54
248 acres on the northeast quarter and 13.26 on the northwest quarter.
Q. Give those figures again.
A. 24.34 —13.26 on the northwest quarter.
Q. Does that include the fourteen acres?
A. No, sir.
Q. Not including the fourteen acres that was gone?
A. That is all lands which are under one foot above the level of the water at that stage of water.

Q. Is that exclusive of the fourteen acres?

A. That is exclusive of the fourteen acres.

Q. What was that 14 acres and what fraction?

A. 14.34.

Q. Isn't there a great deal more land than that 14 acres that is washed away entirely gone at the present time?

A. That I couldn't say. I have nothing to go by except that government quantity.

Q. This is one of the first surveys you made of the property?

A. Yes, sir; it is the first and only one.

Q. I thought you had made another one, and which you could compare?

A. No, sir.

Q. And state whether there had been an increase?

A. No, sir; I have not made any other survey of it at all.

Q. Then from your figures you make a list of the land absolutely gone and absolutely covered by water and within a foot of being covered by water as follows: Actual loss, 14.34?

249

A. Well, that is the loss if you take the government quantity as the original quantity of land.

Q. I am just simply recapitulating your figures as given before, and then upon the northeast quarter a loss of 24.34 acres?

A. Yes, sir.

Q. And on the northwest quarter 13.26 acres?

A. Well, it is the land that lays as close as that under those conditions.

Q. That aggregate upon that basis of estimating 51.94 acres?

A. Possibly; I have not footed it. Yes, sir, 51.94.

Q. Can you tell now how much more of that land would be submerged and within one foot of submergence provided the water stood at 51 on the gauge?

A. I couldn't. I could by calculating, but I can't at present.

Q. What would be your rough estimate from these figures?

A. Well, that I couldn't tell. I don't know as I could make an intelligible estimate of it. It is covered in irregular places; in no regular places.

Q. Well, it would exceed 100 acres, wouldn't it?

(Objected to.)

Q. Now, then, tell us what figures would be covered with water at that gauge of 51?

250

(Objected to. Objection overruled, to which defendant excepted.)

Q. At the stage, then, of 51 inches on the gauge—that is to say, when the water is at the highest point registered by your gauge—if you can tell how much land would be covered by water, or within foot of being covered by water, give us the figures or elevation which would indicate the relative hight of the land and the water at that stage?

A. That stage of 51 inches? Any stations or any ground there of the elevation of 2.08 feet on that plat would have water on it; would be covered with water from the lake.

Q. Would have water on it. Do you not want three feet to take the foot in?

A. If you take a foot in above that you want three feet.

Q. So, from the same basis of calculation, any part of the map which indicates three feet you give the like basis of calculation, with that which you have made of the water at 26 on the gauge?

A. With this exception, with the water standing at 26 inches on the gauge most any land which shows to be at least one foot above makes it boggy, wet, and shows it to be poor land. Take that extreme high stage of water, that wouldn't show the same land that it would at 26 inches. That would be the only difference. It would be on the same basis.

251 By the COURT:

Q. The reason would be that the water passes off?

A. The water passes off and doesn't have the effect on the land where the water stands steady on it.

By Mr. GILLET:

Q. But it does not make any difference in your quantity of land that would be flowed?

A. Not at all.

Q. Therefore, as I understand you now, the map indicating three feet—we will throw off the fraction—at any point would be an indication that when the water was at the highest stage, being 51 inches on the gauge, the water would reach that point on the land?

A. No; it wouldn't reach that point.

Q. Reach, then, within a foot of it?

A. Reach within a foot of it.

Q. But at two feet it would actually reach it and submerge it?

A. Reach the land.

Q. Now, then, we want to know another thing, and that is how we are going to calculate the quantities of each of these stations on the map indicated?

A. Taking a square in here?

Q. Taking a square.

A. Well, they would indicate twenty rods by six, or a trifle over.

Q. 120 square rods?

A. 120 square rods.

252 Q. Now, then, if I found ten stations at three feet, that would be 1,200 square rods?

A. Not unless we found them in conjunction, because a station might indicate just three feet, and yet it might just come to that station and not go any further.

Q. But you have not measured it so minutely that you can make any other estimate than to work at that figure. Take 120 rods?

A. Yes, sir. If we can find a certain number of figures—we find one here and find another up here, the line would go in that direction.

Q. Where a station is over you don't calculate it at all, and yet there might be near the station low land?

A. There might be around that station, of course.

Q. But would it be a fair calculation to regard them as 120 square rods each station?

A. Each four stations.

Q. How many stations are there in the whole map?

A. It takes four stations to indicate 120 rods, you see.

Q. I asked you how much each station?

A. Each station would indicate, then, 30—30 square rods.

Q. Each station indicates 30 rods instead of 120 square rods?

A. Instead of 120.

Q. If I found, then, on that map, say one hundred stations
253 that were three feet or less, I would have 3,000 rods of land subject to that flow of the water at 51 on the gauge?

A. I suppose, approximately, that would be correct, and yet there are certain instances in which it would not. I don't know as you can come at it any closer.

Q. You can get no more accurate rule than that?

A. Unless you take a scale. Unless a man is accustomed to take his scale and make his calculations.

Q. How many stations are there on that map?

A. There are about 800 I should think.

Q. You have not made any calculations, have you?

A. Not as to that extreme high stage.

No cross-examination.

Plaintiff then recalled as a witness J. K. PUMPELLY, who testified as follows:

Cross-examination by Mr. POTTER:

Q. At the time you made this examination of these lands last summer, state whether there had been or was at that time a high wind upon the lake from the north?

A. No; that time it was still.

Q. What was it the day before? Had there been a heavy blow from the north?

A. Two days before.

Q. There had been a heavy blow?

A. Yes, sir; two days before.

Q. That's all.

254 It was stipulated that the record of the Menasha gauge was a part of Mr. Dutchman's testimony.

The plaintiff then recalled as a witness E. P. RADFORD, who testified as follows:

Direct-examination by Mr. GILLET:

Q. Do you know what the record of your gauge has been here during the summer?

A. I don't, except at intervals.

Q. Have you got the interval records?

A. No; I have not.

Q. What is the record to-day?

A. The record to-day is 28 inches.

Q. 28 inches?

A. Yes, sir.

Q. Do you remember distinctly what any other record has been at any other time during the season?

Q. Any other observation of your own?

A. That is all, I believe, that I made a minute of.

Cross-examined by Mr. POTTER:

Q. You read this gauge to-day, did you, of 28 inches?

A. Yes, sir.

Q. Which way was the wind?

A. The wind was west of northwest.

Q. What was the condition of the lake?

A. The lake is frozen over on the edges, but comparatively still outside.

Plaintiffs rest.

255 *Defense.*

The defendant then called as a witness Col. D. C. HOUSTON, who, being duly sworn, testified as follows:

Direct-examination by Mr. POTTER:

Q. Where do you reside.
A. I reside in Milwaukee.
Q. What is your profession?
A. I am a major of engineers in the Army of the United States.
Q. In what particular branch of the service are you now employed?
A. In the Engineer Corps, Engineer Department.
Q. State who has charge of the improvement—who is the officer in charge of the improvement of the Fox and Wisconsin Rivers?
A. I am the officer in charge.
Q. How long have you been in charge of this improvement?
A. Since 1871; that is, of the Wisconsin River. Since 1872 of the Fox.
Q. Who is Chief of the Engineer Department?
A. General A. A. Humphrey.
Q. Under whose authority and direction is Gen. Humphrey?
A. Under the authority of the Secretary of War.
Q. Are you familiar with the Menasha and the Neenah dams?
A. Yes, sir.

256 Q. State whether in your opinion, as the officer in charge of this improvement, it is prudent that the Menasha dam be lowered.

(Objected to.

Objection overruled; to which plaintiff excepted.)

A. I answer in the affirmative. It is, in my opinion.
Q. In speaking of Menasha dam I have reference to the dam that is constructed across the north channel or outlet at Menasha.
A. Yes, sir.
Q. I don't know but there may be other dams there; I have reference to that dam.
A. Yes, sir.
Q. I wish you to state to the jury the situation of this Menasha dam and the Neenah dam with reference to the navigation interests upon that stream, the relation of each one of the dams to the other, if any; and also to state whether since you have been the officer in charge of this improvement there has been any assumption of authority, any acts of ownership, or any work done upon either of these dams. Just state all there is in regard to those facts.

(Objected to as immaterial and incompetent. In the first place, the question is a very broad one; some of it competent, some of it incompetent.)

Q. State what relation, if any, the Menasha dam bears to the navigation interests of the Fox and Wisconsin improvement.

257 A. Well, the Menasha dam is the dam which holds the water of the lake in connection with the dam at Neenah up to its present level at low water, and by that means enables the canal at Menasha to be navigated—to be navigated with vessels drawing about five feet at an ordinary stage of water.

Q. Well, state the necessity of this dam to the navigation interests of the stream, if any?
A. There is no necessity for a dam at Menasha for the purpose of navigation between Lake Winnebago and Lake Butte des Morts.

Q. State whether since you have been in charge of this improvement in 1871 down to the present time, there has been any work done upon this dam by your direction?

A. There has not.

Q. Or by any other persons authorized by the government to your knowledge?

A. Not to my knowledge; no, sir.

Q. Do you know, yourself, of any work being done upon the dam by other parties? By private parties?

A. There has been work done by private parties on the dam.

Q. Do you know by whom?

A. No, sir. I don't know the parties.

Q. Suppose the dam across the Neenah channel had never been constructed and the dam across the Menasha channel had been con-
258 structed as it is, what would have been the effect then upon the waters in Lake Winnebago?

(Objected to as immaterial and incompetent. Objection overruled; to which plaintiff excepted.)

A. Well, it is impossible to state the exact effect of it. It would have been, though, to have raised the water somewhat in the lake. Not to the extent, of course, that exists now. It would have been a partial daming up of the outlet. It would have raised the water just so far as it diminished the outlet of the lake.

Q. The tendency would be to throw the water through the other channel and increase the velocity of it?

A. Increase the velocity and raise the water somewhat.

Q. It wouldn't raise it at the same stage that it would with the other dam in?

A. No, sir, of course not.

Q. Have you any knowledge of the present stage—of the ordinary stage—of water in this lake?

A. Do you mean from records.

Q. Yes.

A. No, sir. I had not consulted the records. That is I have not them in mind.

Q. Do you know of any surveys having been made of the stage of the water in Lake Winnebago, and also the stage of the water in Lake Butte des Morts below?

A. There is a water gauge record has always been kept at Menasha for many years.

259 By Mr. GILLET.

Q. Don't state what it is, unless it is under your charge?

A. The one at Dutchman's Mill is under my charge.

Q. How is that?

A. The water gauge at Dutchman's Mill is under my charge.

Q. And is official?

A. And is official. There is no regular water gauge kept below at Lake Butte des Morts.

By Mr. POTTER:

Q. Are you able to state how much the water was raised in Lake Butte des Morts by the erection of the Appleton dam?

A. No, sir; not positively.

Q. So you are not able to tell then how high the water has been raised in Lake Winnebago by the construction of those two dams?

A. Only I can approximate to it I think. The survey made by Col.

Cram in 1839, before these dams were put in, shows the difference between the level of the two lakes to be one foot, very nearly.

By the COURT:

Q. You mean Butte des Morts and Winnebago?

A. Lake Butte des Morts and Lake Winnebago, yes, sir; what did I say; one foot.

Q. Yes.

A. I meant seven feet and a half, and the present difference of level is eight and a half feet, that would show a rise of one foot so far;

260 and assuming that Lake Butte des Morts had been raised one foot by the Appleton dam which I consider——

By Mr. GILLETT:

Q. If you have no means of knowing, but it seems to be a supposition, then your testimony is objected to as incompetent, and I understood you to say that you don't know.

A. No, sir. I know from no records. There have no records been kept there.

By Mr. POTTER:

Q. State whether you have had any correspondence with the Chief of the Engineer Department in regard to whether it would be prudent or not to lower these dams, the Menasha dams? I don't ask you to state what the correspondence is, but whether you have had correspondence on that subject?

A. Whether I have had correspondence?

Q. Yes.

A. Yes, sir; I have.

Q. State whether you have determined officially as to the propriety of the lowering of the Menasha dam?

A. Yes, sir.

(Objected to.

Objection overruled; to which plaintiff excepted.)

A. Yes, sir; so far as the government is concerned.

Q. State whether you submitted that opinion to the Chief of the Engineer Department at Washington?

A. Yes, sir.

261 Q. I will ask you to state whether the chief of the engineer department took action upon that opinion of yours?

A. He did. He submitted the matter to the Secretary of War for his approval.

(Objected to, because there is better testimony. The court ordered the testimony striken out.)

Q. Have you those papers with you, the approvai?

A. Yes, sir.

Q. Will you please let me see them?

(Witness produces papers marked Exhibit 19.)

A. That is the official letter.

Q. This document is the original official letter, is it not?

A. Yes, sir.

Q. What is this, marked Exhibit 20?

A. That is a copy of a letter of the Chief of Engineers accompanying that official letter, with the endorsement there that is on it.

(Counsel for defendant offered in evidence letter dated May 23d, 1876, marked Exhibit 19, to Maj. D. C. Houston.

Also offered in evidence a copy of a letter dated May 8th, 1876, marked Exhibit 20.

(Objected to as incompetent and not properly authenticated, and as immaterial.)

WITNESS. That letter, marked Exhibit 19, is a regular official letter transmitting that copy.

By Mr. GILLET:

262 Q. Is that the official signature of the Secretary of War?

A. No, sir; all that is a copy that was transmitted with that other official letter. That was signed by his aid-de-camp. The regular official mode of communicating with others, and instructions.

By Mr. POTTER:

Q. The correspondence comes down through the channel from the Chief of Engineers to you?

A. Yes, sir.

(Counsel for plaintiff objected to the letter and copy offered in evidence, and marked Exhibit 19 and 20. 1st. That they are immaterial. 2d. That they are incompetent. Immaterial, because the conclusions which are certified to cannot affect the rights of the plaintiffs in this suit; incompetent, because only certified copies of the official correspondence and papers are admissible in evidence. To make Exhibit 20 evidence it would be necessary to have it properly certified by the department where it belongs.)

COURT. The official letter is received, subject to the objection and and exception of counsel for plaintiff. The copy is excluded.

(Defendant excepted.)

By Mr. POTTER:

Q. State whether any plans have been agreed upon by yourself or by the Chief of the Engineer Department in regard to improving that portion of the Fox and Wisconsin in the neighborhood of Menasha?

263 A. Yes, sir; that plan that I recommended is approved—that I recommended, with the present canal.

By Mr. GILLET:

Q. That recommendation of yours is an official report of yours, is it not?

A. My recommendation was approved by the Chief of Engineers.

Q. In writing, was it not?

A. Yes, sir.

By Mr. POTTER:

Q. Have you that recommendation with you?

A. The main part I have in that copy. It was approved.

Q. Have you the original letter?

A. No, sir.

Q. You haven't it with you?

A. The original letter is in Washington.

Q. Have you the office copy?

A. No, sir.

Q. State whether any surveys have been made by the government under your direction for another route, for a different route than the one now used by the government.

(Objected to as immaterial. Objection overruled; to which plaintiff excepted.)

A. There have been several surveys made for different routes—for a canal from Lake Winnebago to Lake Butte des Morts.

Q. State when the last survey was made.

264 A. When it was made?

Q. Yes; how long since?

A. Well, it was last year, 1875. I can't tell the exact dates. I think in August.

Q. Was that made under your direction?

A. Yes, sir.

Q. State whether the result of that survey was submitted by you to the Chief of the Engineer Department?

A. It was; yes, sir.

Q. State whether it was approved by him.

A. It was.

(Objected to the question. Objection overruled, to which plaintiff excepted.)

Q. What was the route?

A. Two plans recommended to be carried out. One was to deepen the present canal and the other was to make a new canal, which starts from Lake Winnebago.

By Mr. GILLET:

Q. All those recommendations, I suppose, were in writing, were they not?

A. Yes, sir.

(Objected to by plaintiff. Objection overruled; to which plaintiff excepted.)

A. The line for the independent canal that I recommended started from Lake Winnebago and went into the rear of Menasha in a nearly direct line to Lake Butte des Morts.

By the COURT:

Q. South of Menasha?

265 A. South of Menasha.

By Mr. GILLET:

Q. Menasha or Neenah?

A. Menasha.

By the COURT:

Q. Menasha?

A. Yes, sir; about 8,000 feet in length.

By Mr. POTTER:

Q. Then I understand you to say that the other proposition was to deepen the present channel?

A. To deepen the present channel. That proposition still exists. Both propositions do.

By Mr. GILLET:

Q. It is a little piece of ground south of Menasha, and running off to the river at Lake Butte des Morts.

A. Yes, sir.

Q. And across the Wisconsin Central R. R.?

A. We surueyed three or four routes, and that was the one that I recommended.

Q. (Shows witness Exhibit 17.) Here is Menasha; struck off up here.

By Mr. POTTER:

Q. State whether either of these plans were approved by the Chief of Engineers; and, if so, which one of them?

(Objected to as incompetent and immaterial. Objection overruled; to which plaintiff excepted.)

A. This canal route, this last one mentioned, was approved by
266 the Chief of Engineers; also, the deepening of the canal was submitted in my annual report and estimate, and I suppose that is approved.

Q. State whether by the construction of this new canal any dams would be necessary across either of the outlets of Lake Winnebago for navigation purposes?

A. There would not. No, sir.

Cross-examination by Mr. GILLET:

Q. What dams are there connected with this improvement on the Fox River, with this canal navigation?

(Objected to as not cross-examination. Objection overruled; to which defendant excepted.)

A. There is the following dams connected with the improvement, commencing at Depere: Little Rapids, Rapid Cranche, Kankanna, Little Chute, The Cedars, Appleton lower dam, Appleton upper dam, Menasha dam, Eureka dam, Montello dam, and Governor's Bend dam.

Q. What canals are there in conneclion with this improvement?

A. There is the canal at Depere, Little Rapids, Rapid Cranche, Kaukanna, Little Chute, Cedars, Appleton, Menasha, Eureka, Montello.

Q. Have you any means of passing a boat from Lake Winnebago to Green Bay without passing this Menasha channel—canal?

A. No, sir.

Q. Could you operate this Menasha canal without the Menasha dam so as to pass boats?

267 A. With the dam?

Q. Without the dam?

A. Yes, sir. I think so, for light——

Q. In its present condition, I mean.

A. The present draft of water?

Q. Yes.

A. No, sir.

Q. That is the only outlet, is it not; for boats out of Lake Winnebago is through that Menasha channel?

A. Yes, sir; that is the only present outlet.

Q. At the foot of Menasha canal is there a lock?

A. Yes, sir.

Q. With gates, necessarily?

A. Yes, sir.

Q. What is the capacity of that canal?

A. It is about five feet at the present stage of the water—ordinary stage of water. It may be a few places where it is a little less at low water.

Q. The width?

A. The width is about 100 feet—the canal.

Q. The canal couldn't be used without the Menasha dam.

A. Not for the present draft of water.

Q. I mean for the passage of boats for the purpose of commerce?

A. Probably not at low water; that is, for all boats. Some boats could pass—some light-draft boats.

268 Q. What is the comparative depth of the canal and channel—the Menasha channel?

A. It is about the same; that is to say, there are shoal places in the channel. About the same depth as the canal.

Q. The canal is sunk to about the depth of the channel?

A. Yes, sir, except the shoalest places in the channel. The channel has been excavated partially at different times.

Q. Is that channel and lock under your charge as a part of the work of the improvement?

A. I assumed charge of it; yes, sir.

Q. When?

A. 1872. In the fall of 1872.

Q. At the time of the purchase of the work from Green Bay and Mississippi Canal Co. by the government?

A. Yes, sir; just after that.

Q. Who has immediate charge of that lock and canal?

A. Well, Mr. Fuller, at Appleton, at present. C. A. Fuller, assistant engineer.

Q. Any lock-keepers?

A. There is a lock-tender.

Q. Who is that?

A. I can't tell his name.

Q. He resides at Menasha?

A. He resides there; yes, sir.

Q. Do you know how many boats have passed that lock this year?

269 A. No, sir.

Q. Would it be reported to you if any had passed?

A. We have a record; yes, sir.

Q. Has there been ever reporerd to you the passage of any boat this year?

A. Yes, sir; there has been. We have the reports in the office. There has been boats passed to my knowledge.

Q. At this Menasha canal?

A. Yes, sir.

Q. More than one this summer?

A. Yes, sir.

Q. I understood from some source that there has been but one boat passed through this summer—one up and one down.

A. That is a mistake; that is, so far as this Menasha canal is concerned. There has been several boats. The rest of the route has been closed until the first of this month.

Q. Were those maps made under your direction and superintendence?

A. What are those, the profiles? Yes, sir; 2 and 3.

Q. [Exhibit 3.] That represents the channel?

A. This represents the Neenah channel.

Q. What is the distance from this point as represented on the map down to the dam?

A. A little over two miles; two miles, I think.

Q. Does this reach the lake here?

A. Yes, sir.

270 Q. Then it is about two miles from that dam to the lake by way of this channel?

A. According to this map.

Q. What is the hight of that dam—the structure itself—the solid structure?

A. It is about seven and eight-tenths feet.

Q. What is the extreme hight with the little point on top which means flush-boards, I suppose?

A. Yes, sir.

Q. What is the extreme height of the top of that?

A. About nine feet, I should think, altogether. It is not marked here exactly.

Q. What is that stage of water below the dam in reference to Lake Butte des Morts?

A. Two feet; about two feet higher.

Q. Higher than Lake Butte des Morts?

A. At this point. This point is about two feet higher than this.

Q. What is the distance from water to water—that is, from the water below the dam to the water above the dam there at the dam?

A. It is two feet and a half that distance.

Q. You don't catch my idea. The distance from the surface of the water below the dam to the surface of the water above?

A. The hight?

Q. Yes; the hight?

A. It is about six feet—not quite, a small fraction.

Q. What is that red line just above the water?

271 A. That is a horizontal line to Lake Winnebago, used as a datum line.

Q. That line at this point indicates the present level of Lake Winnebago?

A. Yes, sir.

Q. Now, then, what is the difference between that line and the water on this dam?

A. It is .68 of a foot—.68.

Q. Then the fall in the water from the lake to the water on the top of the dam there is .68 of a foot?

A. Yes, sir.

Q. That is about nine inches?

A. About eight inches.

Q. That is for a distance of about two miles?

A. I think it is two miles; just two miles.

Q. What is the depth of the water in that channel above the dam?

A. Here?

Q. Yes; right there?

A. 6.69 feet.

Q. That is the shoalest point, is it not, near the lake?

A. Yes, sir.

Q. What is that?

A. That is 5.14 feet.

Q. Just give us the depth of water below the dam?

A. It is 4.1 feet.

Q. That is at that deepened point?

A. Right there.

272 A. Here.

Q. Just below there where the bottom of the stream rises?

Q. Yes; there.

A. It is 2.7 about.

Q. Now please to state what this dotted line below the apparent bed of the channel is? What is this intended for?

A. That is the line of the deepest water.

Q. Is this the average?

A. Yes, sir; that is the mean level of the bed; that is its mean bottom, and the other is the deepest—the line of the deepest water.

Q. That line, then, is the line of the deepest water?

A. That is the line of the deepest water.

Q. And when you come to average the bed of the stream taking that cross-section, that is the depth?

A. That is the depth.

Q. Just explain to the jury what this cross-section is.

A. That is a cross-section of the stream; that is, this line is taken across the stream perpendicular to it, and a line stretched across the stream—square across, and then soundings are taken every—I suppose these were every ten feet; I can't tell exactly. Soundings are taken every five or ten feet, as the case may be, and these lines show the depths of the water at each one of those points, and this is the bottom of the stream straight across.

Q. Then if you could turn that right around across the stream,
273 that would be an indication of the bottom of the stream?

A. Yes, sir.

Q. And the banks on either side?

A. Yes, sir.

Q. And the depth of the water with their measurements?

A. Yes, sir; measured there.

Q. Where is that next cross-section?

A. Here it is.

Q. Isn't there one below the dam?

A. One below the dam—two below.

Q. The water appears to be much shallower than at the cross-setion below the dam?

A. Yes, sir.

Q. And that hight of the stream appears to be gradual?

A. It is in this section. It is not in this section. At the railroad bridge here; at the wagon bridge it is higher. The stream is no wider here than it is above. It is not as wide; it is wider here. I forget now whether the railroad crosses directly across. I don't think it does.

Q. How far is that cross-section below the dam?

A. About 800 feet, I should think.

Q. Now, how wide is the stream?

A. 540.

Q. 540 feet.

A. Yes, sir; I was in error about that distance. It is about a mile, the distance from the outlet here.

274 Q. A little less than a mile?

A. I have not seen this map in some time.

Q. Then the distance from the lake to the Neenah dam is about a mile, instead of about two miles?

A. Yes, sir.

Q. (Shows witness Exhibit 2.) I want you to give me a little explanation of this. That represents the Menasha channel, doesn't it?

A. Yes, sir; the profile of the Menasha channel.

Q. What is the distance from that Menasha dam to the lake?

A. It is 6,000 feet; here a little less.

Q. That would make it more than Neenah?
A. Yes, sir; that is wrong.
Q. You testified that it was only a mile on the other.
A. Perhaps I had better look that over again. (Witness look' at Exhibit 3.)
Q. That 5,000 feet on that must be from some other point than the lake?
A. That's what it is.
Q. Is that a mile?
A. Yes, sir.
Q. Then this there can't be a mile. Look at this map. (Plat of the town of the island.)
A. On that you see the Menasha channel is the longest.
Q. (Exhibit 2.) I know there is a good deal of difference in the channel.
275 A. Yes, sir.
Q. Then you are correct. The Menasha channel is about 5,000 feet?
A. Yes, sir; about 5,000 feet. About a mile.
Q. What do you find the Menasha channel?
A. 6,000 feet—a little short.
Q. This is on a different scale than the other map?
A. No; it is a small scale. This is 1-2400ths, the other 1-1200ths. Just one-half scale.
Q. What is the hight of that dam?
A. Just six feet.
Q. From the dam frame?
A. From this point here to there. It is marked.
Q. Not including the flush boards?
A. Not including the flush boards.
Q. What is the whole hight?
A. A little over seven feet. About seven feet, a little over. It is not marked here.
Q. At what point does the canal start with reference to that dam?
A. It starts right near the dam.
Q. As indicated on this map of the town of the island?
A. Yes, sir.
Q. That is the point of the dam there?
A. Yes, sir; that is the place.
Q. What is the length of that canal? [Exhibit 2.]
A. It is nearly a mile, I should think.
Q. Where are those cross-sections; where do they belong on that?
276 A. That cross-section is here.
Q. The map shows it?
A. Yes, sir.
Q. The map shows where those cross-sections belong?
A. Yes, sir.
Q. That mark VW?
A. This mark VW here. These others are below. Section A C that is here, in the canal.
Q. The canal is not on there?
A. The canal is not on there; no, sir.
Q. Does that lower dotted line indicate the extreme depth of the water as upon the other map?
A. It is the line of the deepest water.

Q. And the heavy line?

A. It is the mean level of the channel bed. That is, take this cross-section A B, for instance, here the mean depth. The greatest depth there, or the mean of all these would be the mean depth.

Q. Just the average?

A. The average.

Q. The average of that bottom is put on there to make that line?

A. Just to make that line.

Q. When you say that in your opinion it is prudent to lower the Menasha dam, explain what you mean.

A. I mean that navigation between the two lakes can be obtained without this dam.

Q. By what process?

277 A. The first process, by deepening the present canal and the Menasha channel. The second process is by making a new canal, and making the bottom of this new canal so great that there will be sufficient water in it when the dams are removed.

By the COURT:

Q. Bottom so deep?

A. Lower the bottom.

Q. You said so great—you said so deep—so far down below the surface of the lake?

A. Yes, sir. Taking the level of the lake at low-water, and with one canal six feet deep, we dug our canal six feet below that depth.

By Mr. GILLET:

Q. So as to give you six feet of water in the canal?

A. Six feet at low-water in the lake. Then there would be no necessity for a dam.

Q. What is the necessity for a change in the Menasha dam?

(Objected to; he has not testified to any change in the Menasha dam. Objection overruled; to which plaintiff excepted).

A. Well, it has always been one reason ever since I have had charge of the work to get rid of those dams, or, at least, not relying on those dams. we have always been bothered by the mills, and the question of lowering the canal has always been considered, so as to avoid all trouble with the mills. The lowering of the water, the using of

278 the water by the mills in the present condition of the canal interferes with navigation, and if there is any considerable quantity of navigation, why it would be very serious, and it would be necescary to lower the canal somewhat, and in that connection the question of lowering the dams under this law came up, and I was called on to give an opinion. That is the reason I gave it.

Q. The question of prudence arises, does it not, from balancing the cost of paying the probable damages and the cost of a new canal?

A. Partially; yes, sir. That was not the only reason.

Q. Aside from this question of damages for flowage, the question of a change of the Menasha dam would not be a subject of controversy, would it?

A. The Menasha dam itself?

Q. Yes.

A. No, sir. The question of lowering the canal?

Q. Yes. I understood you to say that there had been work done since you took charge of this improvement upon the Menasha dam by rivate parties?

A. Yes, sir.

Q. Do you know that, by contract, Curtis Reed and his associates have the surplus water not needed for navigation?

A. That is the way I understand it; yes, sir.

279 Q. Do you know, aside from Col. Cram's report, what the difference was between the two lakes?

A. Before the dams were built?

Q. Yes.

A. No, sir.

Q. You only know from that?

A. That is the only information I have.

Q. You don't know whether it is correct or not?

A. No, sir; only presumed to be.

Q. Couldn't the Appleton dam be raised, and so raise the water in Lake Butte des Morts, and thus affect the depth of the canal necessarily between the two lakes?

A. No, sir; unless it was raised higher than Lake Winnebago.

Q. Suppose the Appleton dam were made so as to raise the water in Lake Butte des Morts four feet—two feet or four feet?

A. Yes, sir.

Q. You would have just so much less lockage, would not you?

A. So much less lockage; yes, sir.

Q. Then, couldn't the government make the change in that way?

A. That wouldn't effect the depth of the canal at Menasha. That depends on the hight of the water in Lake Winnebago.

Q. What is the hight of the water in Lake Butte des Morts, in reference to the bottom of the canal?

280 A. That wouldn't affect the depth of the canal at Menasha; must be so many feet below the water in Lake Winnebago, without any reference to Lake Butte des Morts.

Q. If Lake Winnebago stood up even with Lake Butte des Morts, there is no need of any canal, only just for a sufficient depth?

A. That is all; you have got to have that anyway. Whatever is the hight of Lake Butte des Morts, you have got to have the same depth in the canal at Menasha.

Q. When did your correspondence commence with the Chief of Engineers on the subject of this Menasha dam?

A. On the first of May.

Q. 1876?

A. Yes, sir.

Q. The present year?

A. Yes, sir.

Q. When did you make your report, to which you have referred—your recommendations?

A. On that date.

Q. Which have you determined to do, or have you determined to do either; to deepen the channel of the present canal, or make a new canal?

A. Determined to deepen the present channel, in the first place.

Q. And try that?

A. That has got to be done—anyway in part—and we propose to do that, if necessary.

281 Q. If you do that what would be the necessity of a new canal?

A. The great necessity of a new canal is to get away from these mills; to have a canal entirely under the control of the government, without anything to do with the water power. That is the principal rea-

son for a new canal. The reason I deepen the present canal, is to accommodate navigation as far as possible, and it involves less expense.

Q. Who has charge of the receipt of the tolls upon these canals?

A. Tolls are collected by the lock tenders and transferred to the engineer in charge.

Q. What amount of tolls have been received this year?

(Objected to.

Testimony taken subject to objection and exception.)

A. I can't tell you—a thousand dollars.

By the COURT.

Q. A thousand dollars, you say?

A. We have not got full returns yet. It was only $350 last year. Something in that vicinity.

By Mr. GILLETT.

Q. For the whole improvement?

A. Yes, sir.

Q. Does that cover both rivers or for the Fox?

A. For the Fox only. The tolls that are collected were on the
282 Fox. You see the locks have been closed; navigation closed.

Q. Have you determined to lower the Menasha dam?

(Objected to.

Objection overruled; to which defendant excepted.)

A. I recommended, so far as the government is concerned, the dam be lowered, and that recommendation is approved.

Q. Have you taken any steps to lower the dam?

A. No, sir.

Q. Has the dam been lowered at all under your administration?

A. No, sir.

Q. Have you received any directions from your superiors to lower the dam?

(Objected to.

Objection overruled; to which defendant excepted.)

A. No, sir.

Q. That's all.

Redirect examination by Mr. POTTER.

Q. At the point where this dam is constructed across the Menasha channel, state whether that channel was originally navigable; whether it is a navigable stream of water?

A. No, sir; it was not. That is, all information goes to that effect.

Recross examination by Mr. GILLETT.

Q. You mean not navigable for boats of such size as are now used?

283 A. Yes, sir. It was used for skiffs and Mackinac boats; used to be hauled up the channel.

Redirect examination by Mr. POTTER.

Q. Through the Menasha channel or both of them?

A. Both channels to my knowledge.

Counsel for defendant stated that Col. Houston had made a mistake and desired to say that the proposed canal went on the north side of Menasha instead of the south side of Menasha.

The following is the letter of the witness D. C. Houston, in regard to

the lowering of the dams at Neenah and Menasha, referred to in his evidence, and offered and received in evidence on the trial:

U. S. ENGINEER OFFICE,
Milwaukee, May 1st, 1876.

Brig. Gen. A. A. HUMPHREYS,
Chief of Engineers, U. S. Army,
Washington, D. C.

GENERAL:

* * * * * * *

In view of these facts it has seemed to me that the question of lowering the dams should now be considered. If, in the opinion of the officer in charge, it is prudent that these dams be lowered, the United States would be relieved from further expenses under this act, so far as these particular dams are concerned. I understand, as a matter of course, that this opinion is to be given solely in reference to the matter of navigation, which is all that the government has to do with it.

284 These dams were originally built by private parties for manufacturing purposes. Had it been simply a question of navigation no dams would have been necessary.

According to the original survey of Capt. Cram, topographical engineer, in 1839, the hight of Lake Winnebago above little Lake Butte des Morts, was seven and one-half feet. These lakes were connected by channels known as the Neenah and Menasha channels. (Tracing enclosed.) It was not necessary to raise the level of Lake Winnebago for purposes of navigation. A canal on the right bank of the Neenah outlet marked by the dotted red line A B, with a dock of seven and one-half feet lift, was all that was required. Nor is anything more necessary now; but this route is impracticable at present, on account of increase in value of property, the ground being occupied. It was important to the water-power interests to obtain an increased head of water, and accordingly dams were constructed on both outlets for water power purposes, thus raising the water level, causing flowage, for which those interested ought to pay.

I have been unable to ascertain the full history of these matters, but for the purpose of this report it is sufficient to state, that when the State undertook the improvement of the lower Fox for purposes of navigation, it made some arrangements with the owners of the dam

285 at Menasha as a part of the route; retained the dam at its present hight, and thus by some legal decision, became liable for the flowage caused by the dams, which legacy it has bequeathed to its successors, the Fox River Improvement Company; the Green Bay and Mississippi Canal Company, and at last the governmant of the United States.

There have been suits pending for many years for damages resulting from this flowage. When the dams were built the value of these lands was very small. The matter might have been settled then at comparatively small cost. But it was the manufacturing interests created by these dams, and the opening of navigation on the Fox River before the time of railroads, that developed that region, building up towns and greatly enhancing the value of property. It is extremely doubtful whether any of these claimants could show any actual loss from flowage on account of the increased value of property, due, in a great measure, to these very dams. The damage to various interests which would be caused by the loweriug of these dams now, is vastly greater

than the damage by flowage then, and these damages appear to be awarded on the present value of property, as near as I can ascertain.

In regard to the lowering of the dams, while so far as navigation is concerned, they can be lowered and even dispensed with; as a
286 practical question they will not be lowered, as the interests of the two thriving manufacturing towns of Neenah and Menasha and other interests are too great to permit it. But I see no reason why the Government should be made to pay all these claims arising from works not necessary for purposes of navigation, and after much consideration of the question, I am of opinion that it is prudent that the dams be lowered, so far as the Government is concerned, and as a practical solution of this matter which will relieve the Government, I would propose to deepen the present canal to such a depth that, if the dams were removed there would be sufficient depth for navigation, or what is better, cut a new canal to the same depth. This latter plan would relieve us from all conflict with the water-powers which is now taken from the canal, and as the dams would not be necessary for purposes of navigation, the flowage damages would fall upon the manufacturing and other interests involved in maintaining them, and I am inclined to the opinion that the question of flowage damages would then be settled at a much smaller cost than by the process now being pursued; or, if the United States is to be held liable in any event, in case the dams are kept up, I would say, remove them or deepen the canal, or make a new one.

I have had surveys made of various routes for a canal to secure
287 the object in view. The estimated cost of the first, and, in my judgment, the best route, marked C D, in full red lines, is as follows:

For a canal 75 feet wide and 8¾ feet deep, which would give a depth of six (6) feet, in case the dams were removed. Length of canal 8,033 feet, mean depth of excavation 18 feet.

For 37 acres of land @ $50	$1,850 00
" 112,462 y'ds of rock excavat'n @ 50 c.	56,231 00
" 337,386 y'd. of earth excavat'n @ 20 c.	67,477 00
Cost of lock	35,000 00
Cost of dredging 30,000 cubic y'ds to navigable water in Lake Winnebago @ 20 c.	6,000 00
	$166,558 00
Deduct from this the cost of lock which will have to be built anyway, i. e., present lock rebuilt, and $25,000 for rock which will be needed for various purposes, reduces this estimate to	$106,558 00

which will cover the additional cost of new route over the present plan. The amount which will be awarded for flowage will be much greater than this; some place it as high as $1,000,000. Moreover by this plan we avoid all trouble with the mills at Neenah and Menasha.

Lake Winnebago is the reservoir which regulates the amount of water in the lower Fox. The use of water by the mills interrupts
288 the uniform discharge of water and interferes with navigation. I am inclined to the opinion that the mere announcement that it is the intention of the government to make this canal, will have a good effect.

This idea of making a canal without reference to the dams is not a new one. I am reliably informed that Gov. Seymour, of New York, who formerly took a deep interest in this work and contributed greatly to

its advancement, advocated this plan, though I believe no surveys or estimates were ever made.

The plan of Capt. Cram contemplated no dams. His plan was a canal starting from Lake Winnebago and striking the river some miles below, but this involved a summit level which is now, at all events, impracticable, as there is not sufficient supply of water.

As an original question, no engineer would ever think of raising the level of a lake thirty miles long and twelve miles wide, and unnecessarily overflowing an unknown quantity of land. The entire western and southern shore of the lake is low land more or less flowed. As near as we can make out, the low-water level of the lake has been raised by these dams about two feet. This will give some idea of the amount of damage to be expected. Not only this but the low lands on the Fox above Oshkosh are also affected.

289 In view of all this I would respectfully recommend the canal above described, which will render the dams unnecessary for purposes of navigation, and relieve the government from liability. There are lands flooded by other dams built by the old improvement company, but these seem to be necessary for purposes of navigation.

Now, when the government is expending large amounts of money for the direct benefit of this section, it seems unjust that it should be called upon to pay claims caused by works constructed twenty years ago when the lands overflowed were of comparatively small value, and when the government was in no way responsible for the works, which were unnecessary for purposes of navigation, and constructed exclusively for private purposes.

I am, General, very respectfully, your ob't serv't,

(Signed) D. C. HOUSTON,
Major of Engineers, U. S. A.

The counsel for defendant then called as a witness LUTHER HOLMES, who, being duly sworn, testified as follows:

Direct examination by Mr. POTTER:

Q. Do you live in this city?

A. Yes. sir.

Q. How long have you lived here?

A. Since 1858, with my family.

Q. State whether you were sworn and examined before the commissioners in this case.

290 A. Yes, sir.

Q. Do you know the tract of land known as the Tallmage tract?

A. Yes, sir.

Q. Do you know this section one, the Pumpelly tract?

A. Yes, sir.

Q. How long have you known those two tracts?

A. I have known the Pumpelly section since 1853. I suppose you have reference when you speak of the Tallmadge section to the farm Mrs. Tallmadge lives on up here—the Darling place.

By Mr. GILLET.

Q. No; Governor Tallmadge.

A. Oh, yes, sir. I am acquainted with that.

By Mr. POTTER.

Q. Where does this Tallmadge tract lie with reference to the Boardman tract?

A. It lies further east and south.

Q. And towards the ridge?

A. I don't know the lines of the land. I know the residence and that is east and perhaps a little south.

Q. That would bring the land further toward the ridge over here?

A. Yes, sir.

B. State whether this Pumpelly tract—this section one—was fenced in 1853, when you knew it?

A. No, sir; it was not. Not on the north line.

291 Q. Next the road?

A. No, sir.

Q. Next the gravel road?

A. No, sir.

Q. It was not fenced?

A. No, sir.

Q. It laid open to commons, did it?

A. Yes, sir.

Q. What distance from this stream was the south line of this Tallmadge tract lying east and south of the Boardman tract?

A. I don't know where the northern boundaries of the Tallmadge tract is.

Q. You can give somewhere near it; I don't expect you can give it exactly?

A. I don't know as I could tell you.

Q. Give some idea in regard to the location?

A. I couldn't say.

Q. Well, you can tell somewhere near it?

A. Well, I will guess at it, and call it a mile; I don't know whether it is more or less; I couldn't say.

Q. State whether, in your judgment, there is any difference in the elevation of the Tallmadge tract above the Pumpelly tract?

A. Yes, sir; it is higher.

Q. How much, probably?

A. I shouldn't like to give an opinion on land so level as that

292 is, by the naked eye, that distance. I don't think the naked eye could tell much about it. It must be higher, because the water runs off. There is a stream of water. That is the only thing I can judge.

Q. Which way does that water tend?

A. It runs north.

Q. Across the Pumpelly tract?

A. I never traced it; I presume it does.

Q. What stream is it?

A. I couldn't tell you; I don't know as I could tell you.

Q. In your judgment how does the Pumpelly tract compare in value with the Tallmadge tract, having reference to the location, the soil, the drainage, and the elevation?

A. Well, sir, I think there is a good deal of that Tallmadge tract that is too much elevated to be valuable.

Q. I speak of that portion that lies below the ridge, west of the ridge?

A. Yes, sir; that is very good land. I should prefer that land of the Tallmadge farm that lays west of the ledge. I ain't a practical farmer.

Q. Well, what, in your judgment, is the difference in value between the two tracts, taking that portion that lies west of the ledge, on the

Tallmadge tract? I am asking you for your opinion on the subject; your best judgment.

A. Well, sir, I ain't very well—I am not a close observer of the
293 Tallmadge farm. I never have been. It has been out of my neighborhood of travel. I have passed there and know that portion of it that lies below the hill. I don't know the lines, and I really don't know as I could put a value upon it, but I think it is pretty good land.

Q. How does the Pumpelly tract compare in value with that land—which is the more valuable of the two in your judgment?

A. Well, I think the Tallmadge farm is. I speak of that which is on the level there; that on the ridge.

Q. Are you able to state how much more per acre?

A. I should rather not, sir. I don't think that I could, from my memory or knowledge of the locality of that land. I don't know that I could give a very good opinion about it.

Q. Do you know the Boardman tract?

A. Yes, sir?

Q. How long have you known that tract?

A. Oh, I have known that tract. I know that farm better than I do the Tallmadge farm. I have seen it oftener, very much oftener.

Q. How does the Pumpelly tract compare in value with that, taken into consideration its location, its drainage, its soil, its elevation?

A. I think it is worth the most money.

Q. The Boardman tract?

294 A. Yes, sir.

Q. How much more per acre.

A. Well, I don't know. It is very easily accessible to this city, more so than the other land—good soil. I don't think I could give you an opinion that would be very reliable on that subject.

Q. Well, sir, we will take it for what it is worth, if you will give us an opinion upon the subject.

A. Well, I should rather have it.

Q. By how much an acre?

A. $20.00, buildings included, and some of it is some more difference than that; of course with the buildings on.

Q. Do you know the small tract that was sold by McDonald, just across the Nevue Creek, on the left of the road that intersects with the main street?

A. Is that the Simmons farm?

By Mr. POTTER:

Q. It strikes me that was testified to by some witness. It has a fine large house on it, a large barn and several out-buildings; a small tract, either five or seven acres.

A. Ain't it the place that Mr. Smith built?

By Mr. GILLET:

Q. No, sir; right across towards Simmons'—the large house.

A. Where McDonald lived—that house up there?

295 Q. Yes.

A. You mean all those buildings.

By Mr. POTTER:

Q. What are those buildings worth in your judgment?

A. I can't tell you very well about those buildings. If you want the naked land I can tell you; I think it is worth $100.00 an acre.

Q. You couldn't fix any estimate upon those buildings?
A. There has been a good deal of money spent on those buildings that a man would not pay much for in my opinion.
Q. How does that land compare with the Pumpelly tract?
A. Well, it is higher land—is worth $100.00 an acre, I think.
Q. Is it worth more than the Pumpelly tract?
A. Yes, sir.
Q. Are you able to state how much more?
A. You mean the average of the Pumpelly tract.
Q. Yes.
A. Do you want I should give my estimate of what I think the Pumpelly tract is worth?
Q. Yes.
A. The whole section?
Q. Yes; then I want you to give me an estimate of all the other section is worth?
296 A. Well, I don't think I could. I don't think I am competent to do it.

By Mr. GILLETT:

Q. Well, give your best judgment about it?
A. Well, it is worth $60 an acre.

By Mr. POTTER:

Q. The Pumpelly tract?
A. Yes, sir.
Q. In its present condition?
A. Yes, sir.
Q. Are you able to say whether striking a line due east and west through that section—which of course would divide the section into two parts north and south—are you able to say from your observation the south part of this section has been damaged by the water from the lake?
A. Striking a line.
Q. East and west?
A. Through the center.
Q. On the quarter line?
A. On the quarter line.
Q. That would divide the section in two parts equally?
A. Well, the north part you say?
Q. The south part?
A. The south part.

By the COURT:

Q. The half away from the lake?
A. So far as I know, I don't think it has.

By Mr. POTTER:

Q. What is your judgment.
297 A. You have taken levels over there. If you will tell me how much higher it is I will tell you very soon.
Q. We want your opinion about it?
A. What are they?
Q. The levels?
A. Yes, sir.
Q. Three feet; three and one-half above a high stage of water; twenty-six inches?
A. Above a high stage of water?

Q. Above a high stage of water twenty-six inches on the gauge, and the center of that section, on an average, indicates three to four feet above a high stage of water?

A. I will do it if you require it. I should take it that it wouldn't be covered by water from the lake, the south part of it.

Q. Do you know where the Mason farm was, lying east and south of Taycheedah Village, just before you turn south on what you call this ridge road?

A. I don't know anything about the lines of it. I know there is such a farm there. That is all I do know. I don't know much about it.

Q. You don't know much about it?

A. No.

Q. That's all.

Cross-examination by Mr. GILLET:

Q. You knew section one, did you, a long time ago?

298 A. Well, I believe I have seen it every year since 1853. I think I have pretty frequently.

Q. Well, now, if the section were in the same condition that it was in in 1853, what would it be worth now if it is worth in its present condition $60.00 an acre?

(Objected to the question.

Objection overruled, to which defendant excepted.)

A. Well, I think it would be worth as much as it is now. I don't think the improvements are worth anything on it.

By the COURT:

Q. How much would it be worth now?

A. I think I saw the biggest growth of vegetation—grass—on there that I ever saw in my life. I don't believe it would grow quite so big now, and I think it ain't been improved any way.

Q. What would it be worth now?

A. I think it would be morth $60.00 an acre.

By Mr. GILLET:

Q. You said it is now worth that just as it is?

A. I think so.

Q. Would it be worth more or less as you first knew it?

A. I would rather take it as I first knew it. I don't believe the improvements are anything on it. It is worn down some.

Q. I mean without any improvements, in your estimation $60.00; you estimate it just as it is now, with what improvements there are upon it?

299 A. I think it was fenced in 1857–'6, or '7 or '8. I won't be particular. I think it is pretty well worn out, and that is about all the improvements I know of.

Q. That's all.

The defendant then called as a witness GEO. RADFORD, who, being duly sworn, testified as follows:

Direct examination by Mr. POTTER:

Q. You reside in Fond du Lac?

A. Yes, sir.

Q. How long have you lived there?

A. I came here in 1850.

Q. Do you know the Pumpelly tract, known as section one?

A. Yes, sir.

Q. How long have you known it?

A. Well, I have known it since that time, a general knowledge.

Q. Do you know of the erection of the dams at Neenah and Menasha?

A. I think the dams were constructed in 1852. I could not say certain.

Q. I don't ask you to state when it was. I ask you if the construction of those dams had been called to your notice?

A. Yes, sir.

Q. Did you know this land before you heard of the erection of the dams in Menasha?

A. Yes, sir; I think I have been over it.

300 Q. You knew the condition of it at that time?

A. Yes, sir.

Q. What was the general character of the land?

A. Well, in 1850 there was a large growth of grass. It was prairie land with some swales through it, rather low in some parts. I think when I went the first time it was in the fall, and I don't remember of it being very wet at that time. That was probably in 1850, but still there was a large growth of grass all over the whole prairie. At that time it was all wild except on that ridge by the road, and that was kind of sandy.

Q. That was on the north part of the road?

A. Yes, sir; from the road to the lake.

Q. What was the character of the land north of what is known as the gravel road between there and the lake?

A. Well, that was nearly level from the road to the lake, with little trees on it and brush and soil. I don't know exactly whether it was—there was some soil on it, but still I should think there was sand underneath. It was used as commons at that time.

Q. What was the condition of this prairie around here including this section one when you first came here in 1850, with reference to its being wet or dry?

A. Oh, it was generally very wet in the spring and early part

301 of the summer. It was a large, heavy growth of grass, and it was wet right even in parts where the city is now.

Q. State whether it was as wet then generally in the early season of the year as it has been since?

A. Oh! the whole country was wetter at that time.

Q. State if you know the south part of this section?

A. Well, I have been on the south land and th'ough the land, but I don't know as much of it as I do of the north land, because the north part you could see a great part from the road.

Q. If you should draw a line through the center of the section, wouldn't you be able to state where that line was?

A. No; only by guess. I could tell very nearly.

Q. You know where the Sheboygan Railroad track is?

A. Yes, sir.

Q. Go twenty rods south of that, then strike a line due east and west. State whether, in your judgment, all that portion of the land lying south of that line is affected by the water from the lake, or has been affected by the water from the lake?

(Objected to. They have not shown that the witness has any knowledge on the subject. Objection overruled, to which plaintiff excepted.)

A. Well, I should think not, but still I don't know for certain. There

302 is a creek runs through, and of course if the water backed up the creek, why it might affect that part of it towards the southeast

quarter of this half on the east side. There is a creek runs through it.

Q. That is Taycheedah Creek?

A. Yes, sir; and a little creek that comes through from the ledge. Then there is some little swales, or places through the land. It might back up there probably, but I never was over it when there was much water on there.

Q. What is the general outline or formation of this Taycheedah Creek?

A. Well, it is a little crooked creek. General direction is north, but still there is a great many crooks in it.

Q. State whether or not that is a very crooked stream.

A. Yes, sir; it is very crooked in some places.

Q. What is there fringing the banks of the streams?

A. Well, there is willows.

Q. State whether it is dense or scattering.

A. Well, some places they are very thick. There is two or three creeks through that country, and, unless they have chopped out, there is willows on the bank.

By Mr. GILLET:

Q. You don't mean that there are two or three creeks on this section?

A. No; not two or three on this section, but this creek runs through other tracts before it gets to there and it is fringed by willows.

303 Q. State whether there are any streams coming from the ridge that put into Taycheedah Creek.

A. Well, there is a sort of indentation or low places on the north half between the gravel road and the railroad. That is not a stream, but it is a place.

Q. No; I mean running streams of water that come down from this bluff.

A. Yes, sir; I think the water from what we used to call McCarley Mill comes that way. In fact there are many streams and springs come through from the ledge down to most all that land.

Q. Do those streams come down into Taycheedah Creek; is that the outlet of that creek?

A. I can't tell whether they all do. There must some of them.

Q. How is it with the stream that comes to the flouring mill out here?

A. That is what forms the head of this creek, I think. It runs from this farm of Phillips' and thro' this section one.

Q. That is a continuation really or a portion of this Taycheedah Creek?

A. Yes, sir.

Q. This is the stream that drives the mill out here with the overshot wheel?

A. It is.

Q. What is your occupation?

304 A. I have been a carpenter and builder most of the time until a few years ago.

Q. Have you been a farmer?

A. No; I never was a farmer.

Q. Ever bought and sold any land?

A. Yes, sir.

Q. In this country?

A. Yes, sir; I have owned several pieces of land off around in the city in different places.

Q. What, in your judgment, is this tract of land—this section one—worth; what is a fair cash value for it?

(Objected to as incompetent. Objection overruled, to which plaintiff excepted.)

A. Do you mean the whole land or parts of it?

Q. I mean the whole of it first—of all together.

A. It is a hard matter to say, because I don't know of its having been sold in that vicinity. Some parts of it are a great deal more valuable than others.

Q. What, in your judgment, is the south half of this section worth south of the imaginary line that I have stated per acre?

A. Well, I should think it was worth $40 or $50 an acre.

Q. What is the north half worth?

A. Well, I shouldn't think that was worth quite as much. Some little of that worth more, because the gravel road goes right through
305 it, and some of that land in there might be sold sometimes for bigger prices for small pieces, but I shouldn't think for farm land it was worth as much as the south half.

Q. About how much?

A. I should think it would be about $10 an acre less, but then I don't mean the one on the ridge, but some of that might be sold for more.

Q. How about the north half?

A. There is a good many places with bushes and holes, one thing and another. The railroad takes out some. They probably might hold it worth as much as the south half, but I should think about $10 an acre less.

Q. There is a large swale on the north half, between the railroad track and the gravel road, quite a depression in there?

A. Yes, sir; but that is not waste land; grass will grow. There is other places down towards where the creek is, that there is some waste land.

Q. Do you know Col. Boardman's farm?

A. Yes, sir.

Q. How far south of the lake from the Pumpelly tract?

A. It is probably a mile from one line to the other. From the south line of the Pumpelly tract to the north line of the other, and lays in the next town; lays a little east.

Q. State whether the Boardman tract is higher than the other tract or whether it is as low?

306 A. The Boardman farm must be fifty feet higher than that, I should think—higher land.

Q. Further away from the lake, isn't it?

A. Oh, yes, sir. It is two miles at least from the lake.

Q. How does this Pumpelly tract compare in value with the Boardman tract that you have just mentioned per acre?

A. Oh, the Boardman tract is the most valuable land of course, considerable, because the Boardman tract has got a road right straight through it—good road. The Boardman tract was originally quite large and had a road on each side of it so that you could cut it all up into eighties, all quite nice farms.

Q. I have reference more to the soil.

A. Boardman's land there *is* no waste land on it at all.

Q. It is good tillable land?

A. There is a little creek runs through that, but it has a good fall and that makes all good grass-land. It had no holes either. The water all goes off in the spring.

Q. State whether there is any difference in the location of these two tracts naturally.

A. Oh, yes, sir; there is a great difference naturally, because one is high up and the other is low.

Q. The Pumpelly tract is low?

A. Yes, sir; except where the road goes. There is no settle-
307 ment. This land laid in a large body. It was wild a long time. It was not settled up on the prairie to what there was up that way.

Q. Do you know where the Tallmadge farm is?

A. Yes, sir; I know it well.

Q. How far is that from this tract?

A. Well, that would be about three-quarters of a mile from here. This Boardman tract and the Tallmadge tract join.

Q. The Tallmadge tract lies near the ridge up here?

A. Yes, sir; and some of it runs over the ridge.

Q. Take that portion that is not on the ridge—the tillable portion, and, in your judgment, which is worth the most per acre, the Tallmadge tract or the Pumpelly tract?

A. Oh, the Tallmadge tract, of course. The Tallmadge tract was considered the choicest tract, or one of them, there was in this vicinity.

Q. What, in your judgment, would be the difference in value between the two?

A. Oh, a great deal. I can't tell the difference, because the Pumpelly tract is a large quantity of land, but, of course, no one man would be willing to buy it all together, and this sold in small pieces, of course, would fetch more per acre, a good deal. Of course there is more difference than half in the value of the land for farming purposes.

Q. More than half?

308 A. Yes, sir; for grain. This is good for grain land and the other is a stock farm.

Q. When you first knew this Pumpelly tract, state whether there was any fence?

A. No. It was all open in one. We used to run right through with a sleigh. It comes right out at the corner there. It was fenced in while I worked in Taycheedah, 1857 or 1858, building a brewery, and it was all fenced in then and in very good condition, and there was plenty of stock in it. I think they had been using it then about two years. I won't be certain. It was used then, at any rate, or a good portion of it.

No cross-examination.

The defendant then called as a witness John Nichols, who, being duly sworn, testified as follows:

Direct examination by Mr. POTTER.

Q. Do you live in this city?

A. Yes, sir.

Q. How long have you resided here?

A. Well, I have resided here permanently since 1849.

Q. Do you know section 1, the Pumpelly tract?

A. Yes, sir; I know the land.

Q. Did you know it in 1849 and 1850?

A. Yes, sir; I knew this section one if that is the land you are talking about.

Q. Yes, sir. What was the condition of that land at that time?

A. Well, most of it, except around the road, was wet land. Most of it.

309 Q. State whether in the spring of the year, at high water, it was covered with water, any portion of it.

A. Well, I guess it must have been, I think.

By Mr. GILLET:

Q. Just answer distinctly from your knowledge, not from what you guess. Taking a high stage of water in the spring, I ask you whether any portion of this land was covered with water from the lake or from Taycheedah Creek or from Luco Creek?

A. I don't think it was much. By the backing of the water, you mean, up from the lake?

Q. Yes, sir.

A. Well, I don't know, exactly, whether it was from the backing of the water or not. The land was very wet south of the road, there. I never took particular notice whether it was from the water backing up from the lake. It was very wet land. There was considerable water on the land.

Q. On the land—on the surface?

A. Considerable water; not on all of it; there was spots on it that was dryer than others, but there was considerable water around on parts of that land down there.

Q. Are you familiar with this south half of this section?

A. Not particularly any more than the rest.

Q. Have you been upon the section within a year or so?

310 A. Well, I have been there probably within 18 months. I don't know as I have, within a year.

Q. Do you know where the quarter line is, east and west?

A. No, I don't know any nearer than I could guess.

Q. The center of the section is a little north of the railroad track where it crosses Luco Creek. It is about twenty rods south of the railroad track where it crosses Taycheedah Creek, about eighty rods south of where the railroad track leaves section. That would be the center of the section. Now take that portion of the section lying south of that line; state whether in your judgment that land is injured by the water setting back from the lake.

(Objected to.)

(Objection overruled, to which plaintiff excepted.)

A. What? Now?

Q. Yes.

A. Well, I don't think it is much back there.

Q. What is that land worth?

(Objected to as incompetent.)

(Objection overruled, to which plaintiff excepted.)

A. Well, of course, I couldn't tell you any more than what I think about it.

Q. Yes.

A. Well, I don't think the land is worth over $20 an acre myself.

Q. Taking the whole tract together?

311 A. Taking the whole tract together.

Q. What is the south half of it worth?

A. I don't think there is much difference in the value of it, anyway, along on the road. There is a streak running along on the road where it is dryer than anywhere else that I should think *it* is more valuable than any of the rest.

Q. What is your occupation?

A. I am a carpenter by trade.

Q. Have you ever bought and sold any farming lands in this neighborhood?

A. Yes, sir.

Q. Do you know the Boardman tract?

A. Yes, sir.

Q. How does that section one compare in value with that tract per acre?

A. Oh, I don't think it is worth half as much.

Q. Take the two pieces in their natural state and how did they compare, when you first knew them, in value? State whether there would be the same difference that you make now.

A. I think there would have been more when I first knew them. I was here in 1845 and 1846 through this country.

Q. You think the difference would be greater in favor of the Boardman tract?

A. Yes, sir; for useable purposes I should say it was worth three times as much.

312 Q. Do you know the Tallmadge farm lying next east of it?

A. Well; I know it, yes, sir; I know it.

Q. How does that portion of that that lies off from the road compare with the Pumpelly tract in section one.

A. There is some low land on that, that *is* appears to be marshy by the creek running through it, wet land—why, that land for anything in the line of farming purposes is worth a great deal more than the Pumpelly tract?

Q. Are you able to state how much in your judgment this Pumpelly tract has been damaged by the water from the lake?

(Objected to as incompetent.)

(Objection overruled, to which plaintiff excepted.)

A. The whole tract?

Q. Yes, sir; that is the way the question reads now.

A. Well, yes, sir; I can tell you in my judgment what I think it is.

Q. Well, sir?

A. Well, I will state that I don't consider that the country here generally has been injured at all—that or any of the rest of it, myself, by the rising of the water on the lake at all. I consider the country better off with it than without it.

Q. Do you *wish* that answer as applying to this piece of land?

A. Yes, sir; this piece of land. Now, if that would be admissable, I would like to tell why I think so.

313 By Mr. GILLET:

Q. I am curious to know, myself.

A. I will tell you that if the water has raised as much as some people claims, why it has made it possible to use this city for milling purposes, for which it has been used, which has created the value of the land right around this city to a great extent, and raised the value of it, and creates more value of the land around this city; has had a great deal to do with creating the value of the land around this city, and enlarging this city, and increasing the population in this city; it has been greatly increased by that means, and the growth of the city is greatly indebted to that; and consequently raised the value of the land immediately around here. This land down there I don't con-

sider any of it, scarcely, very valuable—that is, much of it of very great value for farming lands, except from its proximity to this place.

By Mr. POTTER:

Q. This tract, as well as others, similarly situated?

A. Yes, sir; similarly situated.

Q. I don't remember whether I asked you the condition of this land when you first knew it—whether it was wet or whether it was dry?

A. There is part of it that is dry, sandy land there that runs through it that has always been dry, so far as I know. There is part of it that is wet; that is, the south part—south of the road—that was
314 always very much in the condition, except that. I think it is dryer now than it was when I first knew it—some considerable dryer. This whole city is dryer. That land—the south part of that land—is dryer than it was when I first knew it—much dryer.

Q. Are you acquainted with this Taycheedah Creek that runs across this section?

A. Yes, sir. I suppose that is the name of the creek. It is the creek down there this side of Taycheedah.

Q. State what is the general contour or formation of that creek—whether the banks are straight or whether it is a very crooked stream.

A. It is crooked.

Q. What is there growing, if anything, on either bank of the stream?

A. Well, I guess there is not much of anything—brush. There is some scattering trees somewhere near the bank, along down toward the road; but up south I guess it is mostly brush.

Q. Dense thickets at some places, are there not?

A. What?

Q. Brush is very thick in some places, is it not?

A. Yes, sir.

Q. That's all.

Cross-examination by Mr. GILLET:

Q. You don't regard standing water as of any benefit to the land on which it stands, do you, for farming purposes?

315 A. No.

Q. Your theory in respect to the value of this land is that its general influence upon property in the vicinity is occasioned by the better navigation of the lake?

A. Yes, sir.

Q. From high water?

A. Yes, sir.

Q. Have you ever been upon this land when it was overflowed?

A. Well, I have been on it when it was very wet. Places on it that I couldn't go on to.

Q. When was that?

Q. Oh, that was 1845 and 1846. I was on that land in 1845 and 1846.

Q. Was the land covered with high grass at that time?

A. Well, pretty coarse grass.

Q. Did you ever see any standing water upon it at that time?

A. Yes, sir.

Q. Where?

A. Well, up around there in the south part of it. I couldn't tell you exactly where, but there was water there in kind of pools around.

Q. Was there any considerable part of it what you would call overflowed land?

A. Oh, no; not overflowed in dry weather it would not be.

316 Q. What season of the year was this?

A. Well, it must have been some time about October that I was there, in 1845.

Q. I mean at the time when you saw the water that you speak of

A. Well in 1856. It was in the fore part of the summer.

Q. 1856 or 1846?

A. 1846—1845, it was either in September or November. I mean October or November, and I don't recollect which.

Q. What was the occasion of your being there upon that land?

A. Oh, I was looking around the country here to see what there was in the country. Dr. Darling told me of the different sections of country—land that could be bought here, and I went around to see the places where he told me.

Q. Did you know where the section lines of this section were at that time?

A. No, I didn't; not exactly, only by what I could guess.

Q. Were you in search of the section to look at it with a view to purchase anything of that kind?

A. Well, not particularly, any more than generally. He told me of that. I think he said that he thought section one could be bought for a small sum of money.

Q. What time was that?

317 A. That was in 1845, but I don't know but in 1846—both.

Q. Did he tell you who was the owner of it at that time?—A. No.

Q. You didn't know?—A. No.

Q. Did he have the agency of it?—A. I don't know but he did. He had some. He pretended to know about it. He pretended to know that it could be bought for a small price.

Q. Did you go to look at that section so that you know that you saw the land; and so that you recollect what your observation of it was?—A. Yes, sir; I went down. He named that, and named over several other pieces of land through that country. I went to see them all.

Q. I confined my question to this, as to whether you knew where the boundaries of section one were at that time?—A. Well, I thought I did pretty nearly; that is, not definitely, but very nearly.

Q. Of course you didn't see any section corners?—A. No, I didn't, any more than that—no.

Q. That's all.

The defendant than called as a witness EDWARD PIER, who, being duly sworn, testified as follows:

Direct examination by Mr. POTTER:

Q. Do you reside in this city?—A. I don't.

318 Where is your place of residence?—A. In the town of Fond du Lac.

Q. State whether at one time you were mayor of the city?—A. I was, sir.

Q. How long have you lived in the county?—A. Thirty-nine years and over.

Q. Have you, during any portion of that time lived in this city?—A. About four years.

Q. What portion of the county do you reside?—A. It is the east part.

Q. In the town of Fond du Lac?—A. In the town of Fond du Lac; yes, sir.

Q. How far from the city limits?—A. About thirty rods.

Q. East?—A. No, sir; south. Perhaps not more than twenty.

Q. Did you know in early times this tract of land on section one, called the Pumpelly tract?—A. Always passed section one in going to and from Green Bay, which was our outlet when I came here.

Q. Did you know the condition of that land in reference to water upon it prior to 1850?—A. Yes, sir; pretty well acquainted with it.

Q. What was the condition of it?—A. Well, it was like the most of the rest of the country, pretty wet. There was a streak of land
319 where the road goes through has always been dry and nice.

Q. Where the gravel road runs?

A. Yes, sir.

Q. State whether prior to 1850 you saw any standing water upon it?

A. Oh, yes, sir; standing water most all over the country, at times. Over this flat, I mean.

Q. This is a level portion of the prairie here?

A. Yes, sir.

Q. How did that tract of land compare, at that time, prior to 1850, in respect to its present condition?

A. Oh, it was much wetter in 1850 than it is now. All the whole country much wetter.

Q. Do you know the farm that is now occupied out there by Col. Boardman?

A. Yes, sir.

Q. How does the Pumpelly tract compare in value with that tract per acre?

A. It is not worth as much per acre, I should think.

Q. How much, in your judgment, is it worth less?

A. Well, sir, you fix a price to either one of them, then I can come pretty near it. You fix a standard to either lot.

Q. I don't know that I can do that.

A. It is very difficult for me to tell you just what the difference is.

320 Q. It is in evidence, I believe, that forty-six acres was sold off from this Boardman place for $76 an acre, a short time ago. Now, taking that price as a standard of value of that piece of land, how does the Pumpelly tract compare with that in value?

A. Well, sir, for all practical purposes I should as leave—well, $25 an acre that would be worth by comparison.

Q. That this tract here——

A. If this was worth $76 that might be worth $25.

Q. Now, taking these two tracts of land as they were naturally prior to the erection of the dams at Neenah and Menasha, would there be the same relative difference in the price between those two tracts?

A. I never see it before the erection of the dams at Menasha.

Q. You never saw the Pumpelly tract?

A. No, sir.

Q. You don't know its condition then?

A. Oh, no, sir. I have not seen it. The dams were erected in 1835. I was there in 1835; they were erecting the dams at Menasha—at Neenah.

Q. In 1835?

A. Yes, sir; but I had never seen Fond du Lac at that time.

Q. Do you know when the dam at Menasha was constructed?

A. I don't. I don't recollect.

Q. Well, you saw this Pumpelly tract before 1850?

321 A. I saw it in 1835.

Q. Now, taking the condition of that land at that time and the condition of the Boardman tract at that time, would the same relative difference in value exist between those two tracts of land in your judgment?

A. Yes, sir; the Boardman tract was worth ten shillings an acre at that time, and I wouldn't have taken the other as a gift and gone on to it. It is no great stretch of imagination to get a fine and highly located tract of land at ten shillings an acre, or a piece of poor land partly covered with water, for a poor man to go on to, as I was at the time.

Cross-examination by Mr. GILLET:

Q. You spoke of the dam at Neenah, that was in existence at Neenah. That was a little wing-dam at that time?

A. They were building the dam on both banks of the river when I was there in 1835.

Q. Do you know when the dam was first built across the river?

A. I don't. I presume I knew at the time, but I don't recollect. I couldn't locate it.

Q. What was the general character of this valley at the head of this lake in early times?

A. Very wet.

Q. How did this section one differ from section 14, and other lands adjacent to it?

322 A. Section one, I should think there was more water upon it. I couldn't tell where section one lies. I knew where the east line was but where the middle was I never did know. I rode over it a number of times after cattle, but I never knew precisely the location of one or two, only I knew where the east line on section one was. That was our town line.

Q. Well, the wet land was occasioned by what? Was there any back water upon it from the lake or was it water that rose from showers and freshets that did not run off?

A. Well, I supposed it was water that didn't run off. I have seen my own farm more than half under water. I have seen it so that a flat bottomed steamboat would run up to my place.

Q. Where is your place that you speak of?

A. Section 22.

Q. How far south of this city?

A. Well, part of it is in the city.

Q. By the fair grounds?

A. Yes, sir. The fair grounds is on section 15, right south of there.

Q. When you speak of high water upon this land you speak of such occasioned by high water, do you?

A. Yes, sir.

Q. The water of course didn't remain on it all the season. It ran off.

A. Well, there was various places that when I first came here,

323 on this prairie, perhaps that never were dry.

Q. How are they now?

A. They are dry most of the time.

Q. What was the effect upon this prairie of the large growth of grass upon it, so far as to affect the moisture of the ground?

A. It was very wet; there was no chance for the water to get off. I think I have come in the month of July from my place here with a sled team, and the water followed the sled right through all the way.

Q. What has been the effect of cutting and burning the grass, and of cultivating the ground upon the prairie here?

A. Do you include the opening of the road and ditches?

Q. At an early day this was all covered by high grass?

A. Yes, sir.

Q. What was the effect upon the moisture of the ground—the wetness of the soil—by cutting or burning this grass off—opening the ground to the sun, and by cultivation?

A. My impression is, Mr. Gillet, and always has been, that everything that we did here has a tendency to dry the land; get the water off. If you mowed the grass, the water would run off quicker. It run off quick where we had mowed years before. It run down, and it would be deep above and below, and there it run off quicker.

324 Q. So that every well that has been dug and every ditch that has been dug had its influence in lessening the moisture?

A. Everything; everything that was done in that way had its influence.

Q. Do you know of any reason why this section one should not have the same water upon it from the same causes as the other lands?

A. Only it is a little lower; there is no other reason.

Q. If this land had been elevated as high as the land around it, there is no reason why it should not have been as favorable for all these changes as other lands?

A. I know of none. No, sir.

Q. You place the same values upon the lands. In the early history of this country, when you first came here, there were but very few pieces of land entered?

A. No, sir; just up this river.

Q. This land on this prairie here was government land, was it not?

A. There was five sections reserved; the Parquette reservation.

Q. Aside from these reservations was all government land?

A. Yes, sir.

Q. Then the town of Fond du Lac was all government land except a few farms?

A. With the exception of a company. The Fond du Lac

325 company, as it was termed, had entered land up the river.

Q. And the price of the government land was ten shillings an acre?

A. Yes, sir.

Q. Do you know the present value of farming lands around this vicinity?

A. Well, I could hardly fix it, there is such a variation; I don't consider myself a judge superior to all others.

Q. What is it that renders a farm essentially valuable?

A. Its productiveness, ease of cultivation.

Q. Location to the market?

A. That would have a tendency, but that is not what renders it valuable—ease of cultivation and productiveness. Then of course the location to market always enhances it.

Q. Then there is a very considerable difference, isn't there, in the mere question of the beauty of a piece of land to affect a great many men's idea of the value.

A. Yes, sir; but men don't agree upon that, you know; men of good judgment vary very much.

Q. There is no such thing as an absolute price to real estate, is there?
A. I believe not, sir.
Q. Depends, of course, upon the opinions of the seller and buyer?
326 A. Yes, sir.
Q. As to what the price shall be?
A. Yes, sir.
Q. Have you any part of your farm used for farming purposes now?
A. Yes, sir.
Q. How far south from section one?
A. It is on section 22. Section one is in the corner of the town; section 22 on the west part of it, or of the east part; corners in the middle of the town.
Q. Have you an opinion as to the value of that land?
A. Mine?
Q. Yes.
A. I always inventoried mine—everything I have—in order to see whether I can pay my debts.
Q. Do you inventory it worth what you estimate it worth, or worth its market value?
A. At its market—what it would bring in a day.
Q. You placed a price on the Boardman farm to which your attention was called?
A. $76.00.
Q. Is that your estimate of its value?
A. No, sir.
Q. I mean have you an opinion as to that?
A. No, sir; I rather have the money than to have it.
Q. Do you put low figures on real estate?
A. Generally.
327 Q. Suppose the Boardmen farm were estimated to be worth $60 an acre, what would you regard section one, by comparison, worth?
A. Well, it might be worth about $16 or $17.
Q. About a third as much as that?
A. About a third.
Q. What makes the difference in values?
A. Its productiveness, easy tilled, pleasant to get about upon.
Q. That is what renders the Boardman farm valuable?
A. Yes, sir; it is one of the prettiest location farms that there is in the town.
Q. It is the want of those things in the section one that would change its value?
A. Yes, sir.
Q. That's all.

Redirect examination by Mr. POTTER:

Q. If I understood you correctly, I understood you to state that this same difference in the relative value of these two tracts existed in 1836?
A. No, sir; I said to you that that was worth ten shillings an acre, and I wouldn't take the other as a gift, then.
Q. In 1850, state whether the same difference, that is the difference of one to three, did exist in the value of these two tracts, taking section one and the Boardman tract?
A. You have chosen a very unfortunate time, for section one in 1850–'51–'52–'53, was very wet—very wet.

328 Q. Well, take it a year or two prior to that time. Take 1848; '48, '46, or 1847?

A. Well, Boardman's farm would always fetch three acres for one any time since I have been here for a man that had money and wanted to go on to it.

Q. That's all.

The defendant then recalled as witness E. P. RADFORD, who testified as follows:

Direct examination by Mr. POTTER:

Q. You have already been sworn, and did identify that map as having been made by you?

A. Yes, sir.

Q. Have you got the field notes with you from which you made this map?

A. Yes, sir.

Q. Were those the notes that you spoke of to Mr. Gillet this forenoon?

A. Yes, sir.

(Counsel for defendant offered in evidence the field-notes of the plat of Foud du Lac, Wisconsin, marked Exhibit 21.)

Q. I wish you would point out to the jury upon that map the quarter line east and west on that section one.

A. The quarter stake stands in the creek as it is now, at that point.

Q. That is Luco Creek?

A. Yes, sir; in the bend of Luco Creek.

329 By Mr. GILLET:

Q. Take your pencil and make a mark on either side of the section where the line would come.

A. I will just make a cross on each side. I have got them all marked about. ¼ S. indicates the line on each side.

By Mr. POTTER:

Q. Will you read the stations there on that line?

A. Right straight east between those two points?

Q. Yes.

A. I shall be obliged to take one. I can take station 26. It does not come quite to the line. The one south, the first station just on the section line is in the water, which is minus. The next station reads 3.27, three feet and three inches.

Q. Is that plus or minus?

A. That is plus.

By Mr. GILLET:

Q. That is to represent above the water?

A. That is to represent above the water. The next is 3.96, about four feet above.

Q. You are now going east?

A. Going from the west line of the section east. The next is 3.99, or four feet above.

Q. How far is that from the west line of the section?

A. 60 rods. The next is 4.53, or four and a half feet. The next is 4.31, four feet three inches. The next is 3.72, that would be three feet nine inches. The next is 4.16, would be four feet two inches.

330 The next is 5.53, five feet and six inches. The next reading is 5.09, five feet one inch.

Q. Now, how far are you from the creek?

A. The creek is on the north line.

Q. What is the probable distance, as near as you can tell, from that last reading—five feet some inches—to the creek?

A. I should judge it would be about 150 rods probably; it seems to be about two-thirds of the way across. The next reading is 5.72. That is on the east side, five feet nine inches. The next is 7.97, that would be seven feet eleven inches. The next is 5.79, that would be five feet nine inches, nearly ten inches. The next is 5.19, five feet two inches. The next is 7.83, that is seven feet ten inches. The next is 7.79, that would be seven feet nine inches. The next is 9.45, which would be nine feet and not quite a half.

Q. That is on the east line of the section?

A. That is on the east line of the section.

Q. That is in the northeast quarter of the southeast quarter of section one?

A. In the northeast quarter of the southeast quarter of section one.

Q. And that is through the center of the section?

A. That is a line running through the center of the section—or a line running forty feet south of the center of the section—fifty feet.

Q. Now, take station 13. How far are you now from the south line of the section?

A. Nearly eighty rods from the south line of the section.

331 Q. That is half-way across to the south half?

A. No; half-way between the southwest quarter and the south, post that I first started from.

Q. Just across a forty?

A. Just across a forty, 3.46. Then we come to 4.41, which would be four feet five inches. The next here is 5.97, or about six feet. The next is 7.02, seven feet. The next is 7.78, seven feet nine inches. The next is 6.07, which is six feet one inch. The next is 7.27, seven feet three inches; 8.30, eight feet four inches; 8.64, eight feet and very nearly eight inches; 9.65, nine feet eight inches; 9.45, which would be nine feet six inches. The reading at the next station comes on the bank of the creek, 8.74, eight feet nine inches.

Q. How far is that south of where this ditch intersects the creek, that was sworn to by Mr. Pumpelly?

A. This is right at the corner; the ditch comes in about five rods farther east than that point.

Q. What is the elevation there?

A. 8.74 on the level ground. The bank is high. That is, the surface of the ground at that point.

Q. Eight feet and something?

A. Eight feet and nine inches. The next station was 9.57, nine feet six inches. Then comes 10.06, that is ten feet and an inch very nearly; 10.68, ten feet eight inches; 10.99, or about eleven feet; 12.23, or twelve feet and three inches.

Q. That is on the east line?

332 A. Yes, sir; that is on the east line.

Q. If you will read the figures of the station south line.

A. We started at the southwest corner with an elevation of 6.29, six feet and three and a half inches. The next reading is 7.71, 6.94, 8.83; that would would be eight feet eleven inches; 9.74, nine feet and nine inches; 10.34, which would be ten feet four inches; 11.57, which would be eleven feet seven inches; 11.21, which would be eleven feet and not quite three inches; 12.39, which would be twelve feet five inches; 12.46,

which would be twelve feet and five inches or about that; 12.73, that would be twelve feet nine inches, at that point. The next station comes in the creek or close to it, and the reading was 10.03, which would be ten feet and half an inch. That was the surface of the water.

Q. That was taken on the surface of the water?

A. The surface of the water at that time.

Q. And not from the surface of the ground?

A. And not from the surface of the ground; the station came in the creek.

Q. Did you make a measurement to determine the difference between the surface of the water and the surface of the land at that point?

A. I think I didn't until you get 100 feet further north. Then the reading here is 11.97.

By Mr. GILLET:

Q. North or east?

A. North; our lines run north.

333 By Mr. POTTER:

Q. State whether at the time you made this measurement you also took a measurement from the surface of the soil?

A. Not at that point.

Q. You don't know the difference between the surface of the soil and the surface of the water; in other words, what would be the hight of the bank out of the water?

A. The only criterion I have to govern me is the next station above that.

By Mr. GILLET:

Q. What was the next station above?

A. 11 feet 9 inches—11.79.

By Mr. POTTER:

Q. That was taken to the surface?

A. That was taken to the surface of the ground.

Q. That was a foot and nine inches above the water in the creek?

A. That was a foot and nine inches above the water in the creek, but a little lower down, and the next reading east is 12.41—12 feet 5 inches. The next is 15.45—12 feet 5 inches. The next is 13.40—13 feet 5 inches. The next is 13.84 13 feet 10 inches. The next is 14.17, that is the southeast corner. That would be 14 feet 2 inches.

Q. Did you hear Mr. Pumpelly's evidence on this question of this ditch?

A. I heard part of it.

Q. Did you notice the ditch sworn to by him?

334 A. This ditch I suppose, at this southeast corner, and runs down and intersects the creek near that elbow.

By Mr. GILLET:

Q. Have you got it marked down on that map?

A. No, sir.

By Mr. POTTER:

Q. Will you state what the elevation of the land is at or near the point where this ditch intersects the creek. This elevation in the southeast corner of this section?

A. The elevation at or near that point, the nearest point of it is 8.74, eight feet nine inches. And the elevation at the southeast corner where the creek starts is fourteen feet and two inches.

Q. Are you able to state the distance by the line of the ditch?

A. I am not. The ditch does not run in a straight line, besides it is angling across the piece.

Q. What is the distance in a straight line from the southeast corner to the point where the ditch intersects the creek?

A. I should judge it would be about 120 rods, possibly a little more. It is crooked, the ditch is.

Q. You don't understand me. What is the distance in a direct line from the southeast corner to this point where the ditch intersects the creek?

A. I can't form an estimate. I should think about 120 rods.

Q. I don't mean by the course of the ditch?

A. No; in a direct line.

335 Q. I don't remember whether you gave a reading through on a direct line where the railroad bridge intersects the creek or not, or whether you followed the line of the railroad?

A. No; I followed the east and west quarter line which crosses the railroad.

Q. Now, will you find the station and give the reading of it so that it shall show where the railroad track intersects or crosses Taycheedah Creek? Read that station through.

A. The station nearest to where the railroad track crosses has the reading of 3.28.

Q. I would like to have you commence on the west line and run through.

A. The line through on the railroad track?

Q. No; I don't wish you to follow the line of the railroad track.

A. You mean to indicate a due east and west course through there?

Q. Yes; due east and west course. Commence on the west and show that station where the railroad track intersects or crosses the creek. The nearest one to that point.

A. I will mark station 34 on the plat so as to distinguish it. The first reading is 3.38.

Q. Are these readings all plus?

A. All plus until I have indicated. They all have to be taken as plus unless indicated as minus. The first one is 3.38; that would

336 be three feet four and one-half inches. Next 5.89, which is on the gravel road on that ridge, which would be five feet ten inches. The next 4.19, which would be four feet two and one-half inches. The next 3.73, which would be three feet nine inches; 2.07, which is two feet one inch; 4.22 would be four feet three inches; 3.53 would be three feet six inches. The next elevation is 1.60, which is a foot and seven inches. The next elevation is 2.08; would be two feet one inch; 2.47, two feet six inches; 3.28, just close station to the creek, is three feet four inches.

Q. About how far?

A. It is about one hundred feet westward of the creek on the ground.

Q. That is nearer than the station on the east side?

A. Yes, sir; the east side is two hundred and odd feet. On the east side the reading is 5.22, which would be five feet three inches; 5.09, five feet one inch; 2.81, which would be two feet ten inches; 3.48, which would be three feet six inches; 2.57, which would be two feet seven inches; 3.24, on the east line, three feet three inches.

Q. I ask you to state whether you have been upon this track of land

since this trial commenced, and have been at the point where the railroad bridge crosses Taycheedah Creek.

A. Yes, sir; I have.

337 Q. Since the trial commenced?

A. Since the trial commenced.

Q. In this court?

A. Yes, sir.

Q. State whether you observed the water in the creek at that point at the time.

A. Yes, sir.

Q. State what you observed in reference to it.

A. Well, I was at the creek just at the elbow, before it crosses or runs under the Sheboygan road, and at that point it is filled with willows, growing on the bank and slanting into the stream of water, limbs dipping into the water, and at that point it was considerably blocked up with these willows and yet there was quite a swift current, but the water was running quite rapidly.

Q. State whether there was any ice upon the limbs that had lapped over.

A. There was ice frozen on the limbs.

Q. Now, please state to the jury the difference in elevation between that point that you have fixed there, three feet and some inches—this nearest point to where the railroad crosses the creek and the elevation of the south line of the tract, taking the same station, following the same line down.

A. The reading of the south line is 12.73.

Q. How many inches?

338 A. That would be twelve feet nine inches. The other point is three feet four inches.

Q. Three feet and four inches?

A. Three feet three inches.

By Mr. GILLET:

Q. What are those two points?

A. One is taking a due north and south line. The first reading is the south line of the section.

Q. Is what?

A. 12.73, and the railroad bridge is 3.28.

By Mr. POTTER:

Q. Then the difference in elevation between the two points would be the difference between twelve feet and nine inches, which is the elevation at the south line of the section, and three feet three inches, which is the elevation at that point?

A. Yes, sir.

Q. Making a difference of nine feet six inches?

A. Making a difference of nine feet six inches.

Q. What is the distance?

A. The distance is 3,400 feet.

Q. How much is that in rods?

A. 200. 3,300 feet would be 200 rods.

Q. This is 3,400?

A. It would be two hundred and six rods.

Q. There is one other reading I would like to have you map on the map, and that is reading at the station next north of the gravel road.

A. At any particular line, or take the series right through?

339 Q. Commence from the west and take a direct line through east.

A. Well, commencing at the west line, the first station north of the gravel road, which is about one hundred feet north of it, read 3.70, which would be three feet eight inches. The next is 6.63, six feet eight inches. The next is 6.30.

Q. I will ask you whether any of those figures are taken upon the gravel road or whether they are north of the gravel road?

A. These are entirely north of the fence on the gravel road. The next is 6.30, six feet and four inches. The next is 6.47, six feet and six inches. The next is 4.36. That must be very close to the fence, I should judge, which would be four feet and four inches. The next marking is 3.50, three feet and six inches. The next is 4.28, which would be four feet and three inches. The next 6.34, six feet four inches, and the next is 4.43, which would be four feet and five inches. The next is 4.50, which would be four feet and six inches. The next is 3.37, which would be three feet and four inches; 4.71, which would be four feet nine inches; 4.68, which would be four feet and eight inches. The next reading is 2.96, almost three feet. At that point the gravel road runs out of the section.

Q. That follows the line of the gravel road?

A. That follows the line of the gravel road.

340 Q. But the station is really north of the gravel road and off of the gravel road?

A. Yes, sir.

Cross-examination by Mr. GILLET:

Q. When was this map made?

A. Made in January, 1876.

Q. From whose measurements?

A. Made from measurements made by or under my direction.

Q. Now you just read the elevation of these stations up and down between that gravel road and the railroad.

A. Take the station south of the line?

Q. Yes, sir; begin upon the west side of the section, and read north between the gravel road and the railroad.

A. Well, commencing on the west line here, the first reading is 2.32, two feet and four inches. The next one is a minus quantity, 1.91, that is, in the bayou or Luco Creek, as it is called.

Q. A foot and ninety-six hundredths below the surface of the lake?

A. Below the surface of the water at that time.

Q. Go on.

A. The next is 1.36, which would be a foot and four inches. The next is 2.79, two feet and nine inches. The next is 2.31, two feet and four inches. The next one comes very nearly in the center of Luco Creek, that is a minus quantity, 4.90, pretty nearly five feet.

341 Q. Which way are you going?

A. Toward the gravel road from the railroad.

(Counsel for plaintiff stated that he didn't care about a copy of the figures being taken, as they were on the map, and the map is in evidence.)

Q. Just see how many you will find that are over three feet. The stations run right across that ravine?

A. The stations run right across that ravine between those two points.

Q. You mean that the government quantity of this land was 590 acres?

A. Yes, sir.

Q. By actual calculation, state whether that quantity overruns or not.

A. Well, that I can't tell. I have not been able to make it—of the notes given in that section—close. I never have been able to plat them.

Q. Well, Col. Boardman has.

A. Well, he may have a key that I have never been able to find. I have not been able to make it close.

Q. His testimony shows that that section overruns 590 acres?

A. That may be; I don't know.

Q. You can't answer that question?

A. I would not be able to answer that.

342 Q. Can you tell me how high this land or the banks of this stream are above the water in the stream at any point save the one that you gave?

A. Which point?

Q. You gave one point here in which you said the nearest station indicated a foot and some fraction?

A. Well, here is another point south of that.

Q. You select that point that you did give?

A. This point was on the south line of the section.

Q. The south line of the section?

A. It indicated a foot and nine inches.

Q. How high was the surface of the stream at the south line as compared with the 26 inches on your gauge?

A. It was 10.34 feet above that stage of water.

Q. Now come to the nearest land marked you could touch, how high was the land above the surface of the stream?

A. That indicates the hight would be eleven feet nine inches.

Q. The difference is what?

A. A foot and nine inches. That is a hundred feet in length there, the next point we have in comparison.

Q. Then the water in that stream within a hundred feet of the south line of the section stood within a foot and nine inches of the surface of the land?

A. Yes, sir.

Q. Go along down the stream and see what you find there; if you find anything—one minute, when was that?

343 A. That was in the month of January. Nine hundred feet below that we find an elevation at the station of 10.25. And the elevation given in the water of 6.23.

Q. Right on the bank?

A. The station is about fifteen feet from the bank, and the other elevation of 6.23 is the surface of the water at that point.

Q. That made the bank three feet, about?

A. Four feet.

Q. Four feet?

A. One is 10.25, less 6.23=4.02.

Q. That closes on the stream?

A. Yes, sir.

Q. Have you got anything else to show?

A. The next point, two hundred feet below that, is a bank elevation 9.19.

Q. What is that?

A. As the bank.

Q. For the bank?

A. For the bank. And the stream is 6.26, showing an elevation of 3.13 higher. A hundred feet below that 7.86, with the water at 5.46=2.4 feet. The next place is near the mouth of the ditch, 8.74, 5.27=3.50.

Q. That is right on the bank?
A. Yes, sir.
Q. It was descending?
A. It goes higher as you go east.
344 Q. As you go east?
A. Yes, sir.
Q. How is it as you go west?
A. It grows higher in a very short distance.
Q. Then what?
A. Then slopes to the west.
Q. Drops off?
A. Yes, sir.
Q. Go a little further along down stream?
A. There is another one. Drawing another line twenty rods further west we have an elevation of 5.07. Elevation of the water 3.50. That seems to be at the only point which I think of. There is a point here down a little below the railroad ground reading 3.27. The water 1.25. That is the only point which I think of now.
Q. Now, then, what is the general character of the banks along that stream, high or low?
A. Well, that is rather a hard question to answer. As a general thing the banks are abrupt in a great many places, and yet there are places where you can't get very much on the old banks. They are soggy soft ground.
Q. So that in case of high water comes right out?
A. This soggy ground rises in the course of two or three rods from the creek; will rise into firmer ground.
Q. But there are these little swales that come into the bank?
345 A. Swales where the bank seems to be broken down, preventing it from forming even. That is mostly in the willows.
Q. Cast your eye over that map on the eighth line on which you gave your figures, and see which way the land descends from the stream.
A. As to the direction east or west?
Q. Yes.
A. West.
Q. This land descends to the west?
A. The land descends to the east for a space of forty rods from the creek on that line; I mean the land slopes to the east from this point here, which is about forty rods west from the creek on that line.
Q. It drains that way?
A. Yes, sir; and from that point it drains westerly to the west line of the section; the northwest; the general slope is west and north; it is kind of a diagonal slope.
Q. Just cast your eye along that stream near to the stream by your figures and notice whether the land recedes or rises from the stream.
A. On either side of it?
Q. Yes, sir; you went on a line east and west with your figures.
A. The land rises as you go east from the stream in all instances; and it raises as you go west in some places near to the south side
346 of the line here; in some places nearly twenty rods; and in places it seems to go forty rods, and the balance here it seems to recede to the west; the elevation decreases.
Q. Take that northeast forty and cast your eyes over the figures, do you find that the lowest piece of land on the section?
A. Yes, sir; it is.

Q. Which way does the land rise from there? That is, to the southward or to the east, or does it continue low or does it gradually rise?

A. That would be the southeast quarter of the northeast quarter.

Q. That is from the south line of the northeast forty of the section to the southward?

A. Well, the land there rises as you go to the south; ascends.

Q. And it ascends to the westward, too, or does it continue on along the forty?

A. No; it ascends from the westward to the eastward, then on that next forty south of that.

Q. Ascends?

A. From the westward to the eastward the highest elevations are on the section line.

Q. Well, it ascends eastward then?

A. Yes, sir.

Q. On which forty?

A. On the next forty south of the northeast forty of the section is the one, I believe, you questioned me about.

347 Q. Now, take the forty west of the northeast forty of the section, the second forty on the north line of the section; what is the general drift there in the figures?

A. That has quite a drift north and south both.

Q. Then there is a ridge of land passes through the center?

A. There is; the northern part of the forty from which the land slopes towards the lake from this ridge on the gravel road. The gravel road is built on a ridge, and from the other side it descends towards the creek.

Q. Slopes southward?

A. Slopes southward.

Q. You have estimated that there are 51.94 acres?

A. Yes, sir.

Q. Of land that is within one foot of the water at 26 on the gauge?

A. Yes, sir.

Q. Are you ready now to say what would be the quantity of land within the range of two feet?

A. No; I have not figured that.

Q. Or three?

A. No; I have not figured that at all.

Q. But I can ascertain by taking those figures, which are three feet plus or under.

A. Three feet or under you can.

Q. Three feet or under, and calling each of these stations 30 square rods.

A. You get an approximate amount of the land.

348 Q. Suppose I find then five stations in any part of the map there that were three feet or under, those five stations multiplied by 30 would be 150 rods.

A. Yes, sir.

Q. Lacking only ten rods of an acre?

A. Ten rods of acre; yes, sir.

Q. That's all.

Redirect examination by Mr. POTTER:

Q. I wish you would explain about this creek, about the general formation of Taycheedah Creek, that runs through that section.

A. During its general course through the section?

Q. Yes; what kind of a creek it is; what slope; outlines of it.

A. I don't know as I can explain it any better than by explaining that that map is a correct delineation of every turn in the creek taken by topography, taken at every turn in the creek.

Q. That is probably as good an explanation as you can give?

A. That is the best explanation I can give of it.

CURTIS REED, being duly sworn for defence, says:

I reside in Menasha; have resided here since summer of 1848; was familiar with the north channel of Fox River from the summer of 1846 to the present time; the shoalest water in north channel was about 1,000 feet from the lake; perhaps 1,500 feet; the bottom of this point was a limestone ledge across river; all the shoal places were covered with loose stone and boulders; the largest of these
349 were at the outlets of lake. Have known the water at this point (shoalest) to be of such depth that I forded the stream on horseback in 1846. Think the deepest water on the ford at that time was not less than three feet. Examined the stream more thoroughly in 1847, with a view to building the dam. This, I think, was in July, 1847. Thought the water at this time was somewhat deeper than in 1846. Crossed at this time in a buggy; water came nearly up to bottom of box. Think it was in October when I crossed on horseback in 1846. During the year 1848, after some time in June, I was upon the stream almost daily, boating lumber and other material for dam. When I commenced building dam, which was of brush and stone, took the stone principally from the bed of the river or channel at and near the shallow water or ledge. Worked at and near the ledge thirty-two days in succession. This was in August and September. Should say there was not less than two and one-half feet of water at any time in deepest places on ledge. Never attempted to ford stream except in low water. The body of dam was completed (except combing) in 1849, and was then left to settle for two or three years. Have not refreshed my memory on this point, but think it was two or three years. Think the dam was higher in 1849 than it has been at any time since. Of
350 course, there was a good deal of water running through the dam until it was fairly settled. The combing of the dam, I think, was put on in 1852. The dam was constructed all the way upon the same principle. Commenced in shoal water on both sides and worked towards the center, leaving about sixty to sixty-five feet at center of stream. Don't think the dam has settled at a point near the center. The (60 ft.) gap in dam was closed in summer of 1849. Think the dam was as high, or higher, in 1849 on the average than it has ever been since. The water run over the dam in the early part of season of 1849. Late in the season it did not run over. I built the entire body of dam on my own account, or all that was built up to and during the year 1849. Subsequently, I have done more or less in the way of repairs on my own account. Since the dam was built, and prior to deepening of the channel, have often seen the water so low that it was unsafe for boats to attempt to pass that drew two and one-half feet of water. Have forded the channel since the dam was built, but not since the channel was deepened. I mean at the ledge or usual place of fording the stream. Have frequently been in the stream in a buggy and on horseback when boats were stuck, and have sent teams to take freight from boats when they were aground on the shoal or ledge, since dam was built. I live on shore of river, within a few hundred feet of
351 this shoal or ledge. Since the erection of dam, and prior to deep-

ening the channel, have known one season that the water was so low that boats drawing more than two feet of water could not pass. Of course, there were deeper places, but not of sufficient width to allow a boat to pass. Since the erection of dam the water has been somewhat deeper at this point (the shoaler ledge) than before at usual low water. Don't think it is more than six inches deeper now than before. Have known one season since the dam was built that the water was lower than I ever saw it at any time previous to building the dam. I think the usual difference between high and low water, as it is kept in the channel, is about two feet. The difference between an extreme dry season and an extreme wet one might be three feet. The waters of the channel since the erection of dam have been used for milling and hydraulic purposes.

(Counsel for claimants objects to any testimony as to the purpose for which the waters have been used or the water-power created, except for purposes of navigation.)

Mr. REED. There is now drawn through the canal and through flumes and other outlets for hydraulic purposes not less than 30,000 square inches, measured at the point of discharge upon wheels. At times of high water the gates of locks and waste weirs are left
352 open. These precautions have been habitual at all times of high water. The average stage of water this season is much higher than the average of seasons. Think it is higher this season than any other season since the erection of the dam, with perhaps one exception.

Cross-examination by Mr. GILLET:

I think my charter for this dam was in 1847 or 1848. I commenced to build the dam under that charter. I sold the interest that I conveyed to the State, I think, in 1850. The State undertook to make this improvement for the purposes of navigation. I have done work upon the dam from time to time since my contract with the State. I think the State had charge or control of the dam or improvement for about three years. The State controlled the work by commissioners—five—of whom I was one. The State assumed control of the work at the date of my contract with the State. The board of commissioners had charge of this work under the State. By the terms of my contract with the State I think I was to finish the dam. I do not remember what particular work I was to do under that contract, because I do not remember the particular stage of the work at that time. The State afterwards sold the work to the Fox and Wisconsin River Improvement Company. That company did some work upon the dam. They
353 put in the crib (or pier) work below the dam. I do not remember when the crib work was done. It was built below and adjoining the dam. I don't think the crib work was any support to the dam. I think the crib work stood independently of the dam. The crib work is of stone and timbers entirely. The stone were put in loosely in the cribs and had no effect to tighten the dam. The lower side of the dam was not perpendicular, but sloped outward about a foot. I think the crib work was built to conform to the face of the dam. If the dam were to settle, it (the dam) would not bear upon the crib work. I don't recollect whether the improvemant company did any other work upon the dam. While the improvement company had control of the dam I did some work individually, because that company failed to do it. I put on fine stone and long saw-dust and long manure, etc. The work passed into the hands of the Green Bay and Mississippi Canal Company. The time I cannot tell. Don't recollect that that

company did any work upon the dam. I know I called their attention to the necessity of it. I may have done some work upon the dam while it was in the hands of that company. I have done work upon the dam at various times since it passed into the hands of the State. I had no other point than the dam itself by which to determine whether it had settled, except the adjoining structures and banks of the
354 stream. The top or crest of the dam is now very uneven. The under surface of the dam was planked for about ten or twelve feet. I cannot say when that planking was done, but think it was done soon after the dam was built. I do not remember how high the dam was built above the bed of the stream. I cannot state definitely when the channel was deepened, but think six, or eight, or ten years ago. I think the channel was deepened by the Green Bay and Mississippi Canal Company. It might have been by the Fox and Wisconsin Improvement Company. Mr. Edwards, the engineer for the company, superintended the work for deepening channel. I did not measure the depth of the excavation. The deepest excavation was over eighteen inches in the deepest water at the shoal point, or in other words, taking a cross section at the highest point in the bed of the channel where the excavation was made we excavated at least 18 inches below the point of deepest water on cross section. The excavation was deeper in shallow water on cross section. That gave eighteen inches or more of additional depth of water for boats. The width of excavation was, I think, 100 feet. Granger, who was Edwards' foreman, resides here at Menasha. I based my opinion of the depth of the excavation upon my understanding of the work to be done, and my observations of the work as it progressed. The rock was a limestone formation, deposited in layers.
355 No drilling was necessary. The stone was taken out by the use of bars, picks, and wedges. I have no working plans or survey of the work. Have not taken measurements from which to determine the variations between high and low water. Have not taken measurements by which to determine depth of water in the channel; not specific measurements in feet and inches. Have sounded a great many times with poles to ascertain if there was sufficient water for boats to pass. In calculating amount of water used at thirty thousand inches did not make any estimate of waste water from leakage, but only the actual amount used for milling and hydraulic purposes. In making that estimate I measured the openings of the wheels. The estimate of water used or measurements of water wheels were principally made by Mr. Edwards, the engineer. I am not a millwright, but I assisted in making the calculations or measurement of amount of water used. As a general rule the head is the same on wheels at different points along the canal. All the surplus water above what is required for navigation is owned by Mr. Doty and myself. The mills generally run the year round, or all the time, except when stopped for repairs. The Potter and Dutchman mill has been idle about two months.

Redirect by Hon. CHAS. R. GILL:

356 The dam has settled in some places about two feet more than in others, or about eighteen inches on the average. The crib work was lower than the dam at the time it was put in.

Recross examined by Mr. GILLET:

The water is now kept by flush boards up to the original hight of the dam, or very nearly that.

By Mr. HOTCHKISS:

I have no definite knowledge of how much the water in the lake has been raised, except by such observations as I have stated.

Mr. O. P. CLINTON, being duly sworn on the part of the defendant, says:

I reside in Menasha, on the island. Have resided at my present residence since the fall of 1848, with the exception of six months. Lived one year before that in another house on the island, and one and a half years, still previous, in Neenah. I am a clergyman by profession. Was familiar at an early day with this northern outlet of Lake Winnebago. I frequently forded the river at different points previous to building the Menasha dam. I never forded it during the highest stage of water. I heard read the testimony of Mr. Curtis Reed. I have forded the stream at the point designated by Mr. Reed as the ledge or shoalest water. This point was commonly referred to as the middle ground, because the shoalest water was about in the middle of bed of the river. Have forded here on horseback and in my buggy. In all cases, in fording here, there was sufficient depth of water
357 to come up on to the body of my horse, and at times up to the middle of my horse's body. This was at the deepest points at this ford. I understood the ford thoroughly, as I had frequently examined the channel with a boat, for the purpose of finding the best place to cross. Think I have forded at times during the lowest stages of water for the season. I think I never crossed at this ford when there was less than two and one-half feet of water in the deepest places. This, I think, is a low estimate. Have never forded here since the dam was completed. Did not attempt to ford during the highest stages of water, because I did not consider it safe to do so, but have had occasion quite frequently to pass horses across during high water. This was done by taking a boat and leading or swimming the horse across deep places. For about one year from the fall of 1847 my family was the only one living upon the island, during which time I occupied Gov. Doty's house, and had frequent occasion to cross this ford, and to assist persons desiring to cross on their way to Green Bay to enter land.

D. P. NORTHROP, being duly sworn on the part of the defendant, says:

I reside in Menasha. Have lived here most of the time since April, 1848. Most of the time for the last ten or twelve years I have been engaged in manufacturing pails and tubs, on the water-power
358 created by the Menasha dam. Prior to 1848 I lived one and one-half years in Neenah. Was familiar with the northern channel or outlet of Lake Winnebago before the construction of the dam at Menasha. Had occasion to cross the stream frequently in the fall of 1847 and spring of 1848. I crossed by fording with a team. Crossed at a point about 1,500 feet from lake, or the point referred to by Mr. Reed and Mr. Clinton. Usually found about two and one-half or three feet of water, as near as I can recollect, referring to the deepest places of course. The water frequently came into the forward end of my wagon box. Don't think I ever found less than two and one-half feet of water in the deepest places on the ford.

E. C. CLARK, being duly sworn on the part of the defendant, says:

I reside at Depere. Have had experience in navigating the northern

outlet of Lake Winnebago. Had some experience prior to 1866, and since that time constantly up to last year. First, with a tug-boat for towing logs, and afterwards with a steam freight boat. I remember a spot in the channel, about 1,500 feet from the lake, commonly called the ford or middle ground, with rock bottom. The channel at that point has been deepened, I think, in 1867 or 1868. Am sure it was deepened after 1866. My tug-boat drew 26 inches of water when trimmed up.

359 During the month of August, of the year 1866, the water was so low that I was unable to bring my boat over the ford at the point mentioned. Made soundings for a week or ten days for the purpose of finding sufficient water to pass a fleet of logs into the river and over the ford. In finishing up getting our logs over the ford we found places in the stream on the ford where the water was 23 to 26 inches deep, but not of sufficient width to allow my boat to pass. We got a windlass or hand-tug for the purpose of getting our logs over the ford. Our logs frequently grounded. In making the soundings referred to we waded in the stream. I made the soundings so that I can speak of them in feet and inches. The hand-tug drew only about six inches of water. There has been no difficulty in passing this steam tug-boat over that point since the deepening of the channel. Have stuck on that place with a boat since 1866. This was the same boat referred to above. I mean at a time previous to the deepening of the channel, and after 1866. Have had difficulty at that point after the channel was deepened. Have had barges grounded that were in tow by a tug while passing this point. Those barges usually draw about three feet of water when loaded. The barges were sometimes

360 loaded so as to draw three and a half feet of water, but very rarely. I had very little knowledge of the channel prior to 1866, but was occasionally grounded at this point with a tug-boat drawing two feet to two feet four inches of water prior to that time. I have no knowledge of the channel prior to building the dam at Menasha. Am now engaged in manufacturing hubs and spokes at Depere. Have been engaged in running large boats most of the time since 1871.

Cross-examined by Mr. GILLET:

This improvement does not pass boats now to Green Bay. It has been about four weeks since any boat passed through to Green Bay. The difficulty is a break in the dam at the Cedars, below Appleton. I fix the year 1866 by the fact that the tug-boat I have spoken of was built during the winter previous. I refer to the steam tug-boat. I built this boat. This is according to my general recollection. Have not referred to any memorandum or dates to refresh my memory. Commenced to run this boat about the first of June, 1866, I think. This boat was built at Winneconne. I think in the spring of 1866 the water was very high, but the summer was dry. I cannot possibly fix the date of the deepening of the channel referred to. The bottom of the stream at the ford was rock, except a narrow strip near or on the north shore. I judge that the shoal was three hundred and fifty feet or more in length, but the ford proper was a narrow

361 strip across the stream. There was channels of deeper water; I mean the water was not of uniform depth clear across the stream. The deepest channel was near the north shore. The highest point of rock was generally near the center of the stream. Am not positive whether the rock or ledge came to the surface at any time during low water or not. The size of my steam tug was seventy-three feet keel and sixteen feet beam, with flat bottom. The channel near the north

shore was, I think, about fifty feet wide. This channel was deepest in the center. There was also a channel on the south or island side, but not as deep as the one along the north shore. I used the north channel for navigation. The low water of 1866 continued, as near as I can recollect, for about six weeks. We had the same trouble in 1867 that we did in 1866, but don't think the water was quite as low in '67 as in '66, but so low that we gave up trying to run the boats over the ford. This was previous to the deepening the channel. I ran the steam tug-boat in 1868. I crossed the ford with the boat in 1868; continued to cross through the entire season. I don't remember the stage of water during the season of 1868; had difficulty in passing the ford in '68; we were towing a barge for about two months steadily;
362 were freighting wagon-timber. Had no difficulty with the tug, but did have with the barge. The barge drew usually about three feet of water. The tug drew about twenty-six inches of water. Ran the tug-boat along the lake shore and up the Wolf River. The channel had been deepened at this time (1868). Cannot state positively when the channel was deepened, but think it was in 1867. Do not remember the stage of water in 1868, as compared with 1866 and 1867. Think they were about a month in deepening the channel. There was a dam built above the ford to shut off the water while engaged in making the excavation for deepening the channel. I ran the steam tug-boat four seasons, commencing with 1866. Don't remember having any difficulty from low water at the ford during 1869. I navigated this stream in 1870 with a steam tug-boat called the P. V. Lawson. Ran the Lawson up the lake and river. The Lawson was eighty-five feet keel and twenty feet beam, and drew two feet of water. Ran the Lawson one season (1870). Don't remember having any difficulty from low water that season. Ran the freight-steamer Flora Webster during theseason of 1871 over the same route. The Flora Webster was twenty-eight feet beam and one hundred and twenty-seven feet keel, and drew three feet of water. There was not sufficient water during the entire season for this boat. The difficulty was
363 from the latter part of July until sometime in September, during which time did not pass the ford with this boat. Ran the Flora Webster in 1873 and 1872. Had difficulty in 1872, but cannot state for what time. It was about the same in 1873. I may be mistaken as to the date of 1866 in my testimony. That year, as given by me, perhaps should refer to the year 1867. If so, then the four years referred to would extend to 1871. I still think I was correct in stating the time to be 1866, and that my statement was correct in the first instance.

ALONZO GRANGER, being duly sworn on the part of the defendant, says:

I reside in Menasha; have resided here most of the time since 1849. I remember the circumstance of deepening the north channel or outlet of Lake Winnebago, at the ford or middle ground. Think it was done in 1867. I was foreman for the engineer, Mr. Edwards, who was in charge. Removed the rock from the channel to a depth of nineteen inches and a fraction. I mean I removed the rock to a depth of over nineteen inches at the point of deepest water on the ford, and not less than one hundred feet in width. This was, according to Mr. Edward's levels, before and after the work was done.

364 WM. DUCHMAN, being duly sworn on the part of the defendant, says:

I reside in Menasha; have resided there for about 25 years. I re-

member the deepening of the north channel or outlet of Lake Winnebago. Think it was done in 1867, during the month of August of that year. There has been a record kept of the stage of water above the dam for several years at my mill. This record was kept partly by myself and partly by men employed in my mill. We practiced reading and recording the stage of water each day at one-half past twelve p. m., and at one-half past six p. m. during the entire year, except when there was ice in the stream. This practice was uniform, except for a part of this season. Have no records myself for any season, except the present. These records were sent to the engineer at Appleton, and kept by the improvement company.

(Mr. Gillet objects to parole testimony as to the records without their production.)

The average variation between high and low water I cannot give, as to any particular season. The lowest I ever knew it was to stand at four inches on the gauge from which we took the record, and have a distinct recollection of its being up as high as forty inches on the gauge, and think I have seen it above 40 inches—say somewhere between 40 and 44 inches. Two years ago this summer the water
365 got down to eight inches on the gauge. I would call 12 inches on the gauge an ordinary average low-water mark, and would call 24 or 26 inches the ordinary average high-water mark. Have known the gauge to mark a variation of fifteen inches in a very short time—say sometimes in a half hour. Can hardly tell how long the water would be kept up or down in consequence of the wind, but think about one or two hours. Think the water has been higher on the average this year than the average of other years. The water-gauge has been kept at its present location for a period not less than twenty years, and I have frequently observed it for all that time, but have not kept the record all the time. Don't remember how long the record has been kept. Sometimes the mills are all running, and sometimes three or four of them would be shut down for repairs, but generally they are all running.

Cross-examined by Mr. GILLET:

I began my record for this year on the twenty-eighth day of April. The ice went out of the lake on the 15th of April. With two exceptions, the largest variations during this year, thus far, between noon and evening, has been three inches. Those exceptions occurred on the seventh day of May, when the variation was sixteen inches fall
366 from forty inches, to twenty-four inches, when the wind was strong from the southwest and changed to the northwest strong. The other exception was on the twenty-seventh of June, when the wind was strong from the north, and the variation was six inches, with moderate wind from the same direction. As to the other facts which I have given, I state them from my best recollection, without reference to any records or papers. The note or record is made just at the time, without reference to any variations that may have occurred at any time between the hours of taking the observations. The lowest point or stage of water, marked by the gauge for this year, since the twenty-eighth of April, is twenty-one inches, which was on the twenty-sixth of July inst. On the twenty-eight of April, at noon, the wind strong from the southwest, the water stood at thirty-four inches. On the first day of May, with moderate wind from the east, the water stood at thirty-four inches. On the tenth day of May, with light wind from the south, the water stood at thirty-three inches. On the twentieth May, light south wind, water

thirty-one inches. On the thirtieth May, moderate south wind, water thirty-two inches. On the tenth June, no wind, water twenty-eight inches On the twentieth June, moderate south wind, water twenty-eight inches. On the thirtieth day June, light west wind, water twenty-seven inches. On the tenth July, moderate northwest wind, water twenty-seven inches.

On the twentieth July, moderate southwest wind, water twenty-
367 six inches. On the twenty-ninth July, moderate southwest wind, water twenty-three inches. All the last above observations were taken at noon of each day. On both the sixth and eighth days of May the water stood at thirty-one inches.

FOX RIVER IMPROVEMENT.

Water gauge for month of June, 1875, at 12½ and 6½ o'clock p. m., level at Menasha, zero of gauge.

Days.	12½ o'clock p. m.			6½ o'clock p. m.		
	Wind.		Wat'r.	Wind.		Wat'r.
	Direction.	Force.	Inches.	Direction.	Force.	Inches.
1	NW.	XX	26	NW.	XX	26
2	W.	do.	27	W.	XXX	26
3	SW.	do.	31	SW.	XX	31
4	SW.	X	29	W.	do.	28
5	SW.	XX	29	W.	do.	29
6	SW.	0	29	NE.	do.	26
7	W.	XX	28	SW.	do.	29
8	SW.	do.	29	SW.	do.	29
9	S.	do.	29	SW.	do.	29
10	S.	0	28	S.	0	27
11	S.	XX	29	W.	XX	28
12	NE.	do.	28	NE.	do.	28
13	S.	X	28	S.	X	28
14	S.	do.	27	S.	do.	27
15	SE.	XX	27	SE.	XX	28
16	SE.	do.	27	S.	0	28
17	SE.	do.	27	SE.	XX	27
18	E.	X	28	E.	X	28
19	S.	do.	28	S.	do.	28
20	S.	XX	28	S.	XX	28
21	S.	do.	26	S.	do.	25
22	S.	do.	25	S.	do.	25
23	S.	XXX	26	S.	do.	25
24	SW.	X	23	W.	do.	22
25	SE.	do.	26	SE.	X	26
26	SE.	do.	26	SE.	do.	26
27	N.	XXX	21	N.	XX	26
28	E.	XX	28	SE.	0	27
29	W.	do.	27	SW.	X	27
30	W.	X	27	W.	do.	27

0—No wind.
X—Light wind.
XX—Moderate wind.
XXX—Strong wind.

Water gauge for month of July, 1875, at 12½ and 6½ o'clock p. m., level at Menasha, zero of gauge.

Days.	12½ o'clock p m.			6½ o'clock p. m.		
	Wind.		Wat'r.	Wind.		Wat'r.
	Direction.	Force.	Inches.	Direction.	Force.	Inches.
1	W.	X	26	SE.	XX	28
2	SE.	do.	26	SE.	do.	27
3	SE.	do.	26	SE.	X	26
4	SW.	do.	28	S.	do.	28
5	NE.	do.	28	NE.	0	28
6	N.	do.	26	W.	X	27
7	W.	do.	28	W.	do.	28
8	SW.	do.	28	SW.	do.	28
9	SW.	XX	28	SW.	do.	27
10	NW.	do.	27	E.	XX	29
11	S.	X	28	S.	X	28
12	SW.	XX	28	W.	XX	27
13	SW.	X	27	SW.	X	27
14	S.	do.	27	S.	do.	27
15	SW.	do.	27	S.	do.	27
16	W.	XX	23	NW.	XX	26
17	E.	X	26	S.	X	27
18	S.	do.	27	S.	do.	27
19	SW.	XX	26	SW	do.	25
20	SW.	do.	29	SW.	do.	25
21	N.	0	25	N.	0	25
22	N.	X	23	NW.	X	22
23	N.	0	22	SW.	0	22
24	S.	XX	23	S	XX	23
25	SW.	XXX	25	SW.	X	23
26	SW.	XX	21	SW.	XX	21
27	SW.	do.	22	SW.	X	22
28	SW.	do.	22	SW.	XX	22
29	SW.	do.	23	SW.	do.	22
30	NE.	do.	20	NE.	do.	19

0—No wind.
X—Light wind.
XX—Moderate wind.
XXX—Strong wind.

P. V. LAWSON being duly sworn, on the part of the defendant, says: I reside in Menasha; have lived there since the fall of 1856. Am engaged in the business of manufacturing spokes and hubs at
369 Menasha. Am familiar with the northern channel or outlet of Lake Winnebago. Became familiar with it first by taking logs through the stream to my mill. Have passed through the channel on steamboats, and have owned steamboats used for navigating this stream and the lake. Have stood in the bow of the boat and made soundings for the captain frequently while passing the ford; and also have seen others make soundings from the bow of the boat at the same place Have also passed this point in a canoe and other row boats with the captain, and made soundings to ascertain if there was a sufficient depth of water for the steam-tug to pass. Have also buoyed the channel, so as to mark the deepest water in the channel. The soundings were taken from the bow of the boat with a pike pole that was marked off in sections of six inches. The variations between the marks were estimated. The lowest water I ever found was two feet and four inches at the deepest place on the ford. This measurement was made the first year I used my steam-tug. The second year it was about the same. This boat was the T. W. Lake, the same one referred to by Mr. Clark in his testimony. At that stage of water I could

not run my boat over the ford, although she drew only two feet of water, on account of loose stones in the bottom of the channel. This was the year previous to deepening the channel. The next season was about the same up to the time of putting in the coffer-
370 dam. Have made soundings since the deepening of the channel, and buoyed the channel the last of September, 1871, and in June, 1872. In September, 1871, found about three and one-half feet of water; and in June, 1872, about four and one-half feet of water. I think the variation or difference between high and low water in an ordinary season is about two feet. I think the variation would oftener be 26 or 28 inches than less than two feet. One point of observation as to the rise or fall of the water is a guy-post at the north end of the upper draw-bridge. At times of high water, the water stands over the clevis that holds the guy-rod to the post. In low water it falls below the rod where it goes into the post. I have noticed this point, I think, more than a hundred times; also noticed the same variations on the pier of the bridge above referred to. Have also noticed the water on the dam. In extreme high water the depth of water on the highest point of the old dam is about eighteen inches, and in ordinary high water it is about a foot in depth. There are a number of other objects or points of observation upon which I base my opinion as to the variations between high and low water. At all times when we saw indications of high water we asked Mr. Edwards to allow us to open the lock-gates. At such times the lock-gates were always opened. On Sundays we were in the habit of blocking our water-wheels and
371 leaving the gates open during high water. I meant to say that the lock-gates were kept open nights and Sundays, and sometimes during week days. There is a waste-weir on the channel near the lock, but it is not of much account. The Menasha dam has not been increased in hight since I have known it, or since 1857, in which year I built a bridge on it. This dam has settled in some places over two feet since I knew it. Don't think it has settled much at one place near the center. Think the average settling of the dam is some ten or twelve inches. When the crib-work was put in it was eighteen inches lower than the dam.

Cross-examination by Mr. GILLET:

The flush boards are not always kept on the dam. In time of low water they fall down. When the water begins to fall, in times of highest water, or when the water is about six inches below high-water mark we put them on again. Then they are kept on until they fall down again. Have always calculated to hold the water at the hight of the highest point of the dam, say two or three inches. Have never made any actual measurements in feet and inches, as to the variation between high and low water. I know the dimensions of the timbers on which the bridge turns. The upper timber is eighteen inches square, and those below are ten inches square, and I have made
372 my calculations from observing the water upon those timbers. Once or twice I have observed the water standing upon the top of the abutment or turn-table of the bridge, but cannot give the dates when this occurred. Don't think it has occurred in the last five years. I have had as much charge as anybody of the flush boards upon the dam. Have been in the habit of sending my boats through the canal. Don't know as there has been any one in charge of the canal at this point. I mean any one here at Menasha, except the lock tender. The lock tender never exercised any authority over the canal to my knowl-

edge. He simply let boats pass in and out of the canal. Don't know as any one has had charge of the dam unless Mr. Reed.

Redirect examination by Mr. GILL:

Putting on the flush board does not generally have the effect to raise the water.

Recross-examination by Mr. GILLET:

Putting on the flush boards would have the effect to raise the water in case the water was rising, but not if the water was falling.

PATRICK MCFADDEN, being duly sworn on the part of the defendant, says:

I reside in Menasha. Have lived in the vicinity of Menasha about twenty years. Commenced work on boats on Lake Winnebago in the fall of 1855, and have been more or less in that occupation ever since. Have been captain of boats during a portion of the time. In
373 navigating the lake and river, have been familiar with the channel between the lake and Menasha. I know the point of shoal water about 1,500 feet from the lake, with rock bottom. Think I have known times when the greatest depth of water on the ford would not exceed two feet, or rather that boats drawing more than two feet of water could not pass, and that the depth across the stream at that point would not exceed twelve or fifteen inches. There might be places where the water was more than two feet in depth, but not of sufficient width to allow boats to pass that drew more than two feet of water. Have noticed the water at about that stage for many years. Cannot tell the precise number. Have navigated the channel at that point since it was deepened. Think there is from eighteen inches to two feet more water on the ford since deepening the channel. At all events I have always found lots of water there since. My boat drew from three to three and one-half feet of water, and if she was coming in under a good breeze, she might be drawing four feet.

R. M. SCOTT, being duly sworn on the part of the defendant, says:

I reside in Menasha. Came here to reside in 1852. Have been up and down the northern channel or outlet of Lake Winnebago on boats, and know the point in the stream known as the ford. Have frequently seen boats aground at that place. Have had fleets of logs get aground
374 at that place, and have had boats that were bringing wheat to my mill get aground there and was obliged to lighten them off. Have noticed this low stage of water in different years, and it was common, except in seasons of high water. I am speaking of seasons prior to the deepening of the channel. Have owned a mill on this water-power since 1858 or 1859. Have generally been accustomed daily to be about the water-power and along the banks of the stream when at home, which is most of the time. Would say that the difference between high and low water in an ordinary season would be about two feet. Think the difference between the highest point I have ever known and the lowest point I have ever known would not exceed two and a half feet. Am speaking of the stage of water above dam. At times of high water the lock-gates are usually kept open and some of the mill-gates are kept open nights and Sundays, as I have been informed. Have not opened my mill-gates on account of high water. In times of high water there are no flush-boards on the dam. The dam was completed when I came here to reside in 1852. I think I came here in June, certainly not later than July. The plank covering or combing

was on the dam when I came here to reside. Don't think the elevation of the dam has been raised since I came here. Think it is lower on account of the settling of the dam. When the crib was built
375 it was lower than the dam. I wanted it built as high as the dam.

Cross-examined by Mr. GILLET:

I call high water the time when the greatest quantity of water is flowing over the dam, generally in the spring of the year. There are no waste weirs along the canal that are used, except the mill-gates and dock-gates. I think the canal is about half a mile in length. In estimating the range of high and low water, have done so from observation, and not from actual measurement.

JOHN STEVENS, being duly sworn on the part of the defendant, says:

I reside at Neenah. Came to Neenah in 1874; for four or five years I was engaged in fishing, hunting, and sailing. Since that time I have been engaged in milling. Have navigated the northern outlet of Lake Winnebago. I have had the misfortune to get aground and have had to get out and wade. In hunting, I have had to go into the water after game in both channels. I am familiar with the ford in Menasha channel. Prior to the channel being deepened I have been aground there in a sailing vessel drawing two and one half to three feet of water. I have sounded the channel at that place. At that time the channel was not as free from loose stones and boulders as it has since been, which caused us to sound for the deepest water. The stage of water above mentioned was not confined to that year, but extended
376 over a period of four or five years prior to deepening channel. Since deepening channel I have not known of any vessels getting aground at that place. My milling interest is on the Neenah or south channel. I commenced business in 1869. There are two canals from the Neenah dam, one of which leads to Lake Butte des Morts; or rather, there is one canal with a branch discharging into the river. The canal above the point at railroad bridge is about 175 feet wide and about four feet deep on an average. There is about 20,000 inches of water discharged by the various mills and factories on the canals, and the leakages amount to about twenty-five to fifty per cent. exclusive of what passes over and leaks through the dam or other discharges. We have a dam about 500 feet long. In high water we take off the flush boards. In the spring, four to six weeks before the water commences to raise, we take off the boards. We have a waste-way eighty feet long by four feet deep which is open through the high water. We open the lock-gates or have sawed off the plank in the upper section of the gates in high water. The lock is thirty-five feet wide. The practice is to open the gates at the mills when the mills are not running in high water. The gates in the branch canal also managed in same way. I have had charge of the canal as chairman of the water-power committee. In low water the use and waste of water is not as great as formerly,
377 but in high water the waste is greater as we have greater facilities for letting off water. The water is not allowed to get as high as it formerly did. '56 and '57 I was employed as watch on dam. I think those were the years of highest water. The leakage through the old dam was very much greater than it is now. It was immense. The new dam was built somewhere about five years ago.

Cross-examined by J. M. GILLET:

Since I have been at Neenah parts of the dam have been washed out a number of times previous to the building of the present dam. When

I first knew the dam it was not a wing-dam, but was built across the river. According to my recollection the first large break in the dam was while I was sailing on lake. From 150 to 200 feet went out at that time. The next break occurred within the five years I was sailing; it was about 150 feet at first, but enlarged to 170. There was still another break about 1869, and after I was milling. I was on the committee at that time; there were two breaks same year. They both occurred the same day, broke in two places; one of them was about eighty feet across, the other was shallow, only two or three timbers off, but one hundred feet in length. Gilbert C. Jones, with the mill owners, maintain the dam, and contribute pro rata according to the
378 amount of water owned and used. The present dam is built on same ground as the first, substantially. The new dam or "repairs," as we call it, is very much more substantial than the first. No part of the dam has gone out since rebuilding.

Mr. P. V. LAWSON, at his own suggestion, desires to make an explanation or correction in his testimony, as follows: In my testimony I stated that a timber under the bridge that forms a part of the turntable was eighteen inches square. I find I was mistaken. The timber now there is sixteen inches square instead of eighteen inches. The timber I put in when I built the bridge was eighteen inches square. The bridge has since been repaired, and a new timber sixteen inches square put in place of the one originally put in by me.

Question by Gen. GILL:

Since giving my testimony yesterday I have been on the dam and examined more particularly as to amount the dam has settled. I am now of the opinion that the dam is not any higher than the crib work. I now think the average settling of the dam is about eighteen inches.

Question by Mr. WALTERS:

The break in the Neenah dam did not lower water in the Menasha channel. On the contrary, the water in the Menasha channel continued to rise about an inch a day for three or four days after the break. The breaks in the Neenah dam, always occurred at times
379 of high water. The highest water I have ever known was in the years 1857 and 1858. Perhaps it might have been as high at one time since, say about 1866 or 1867.

W. H. HEARDING, being duly sworn on the part of the defendant, says:

I reside in Milwaukee, and am assistant U. S. engineer; have been in the employ of the U. S. Government in that capacity for twenty-two years; am acquainted with Lake Winnebago, in this State. It is a body of water about thirty miles long by about eight and one-half wide; have been accustomed to taking levels and surveys on and around large bodies of water. The level of Lake Winnebago, or any other large body of water, is a more reliable evidence of a perfect level than can be obtained by any mechanical appliance, except at such times as its surface may be influenced by winds, or atmospheric pressure. In case of the agitation of the waters of the lake by strong north or south winds, it would probably take eight or ten hours for the water to find its level after the wind had ceased blowing. I made the profile maps here exhibited of the two outlets of Winnebago at Neenah and Menasha. They were made from my own measurements and levels, and are practically correct. The arrow lines of soundings are

all calculated with reference to the level of the lake. This ap-
380 plies to both channels. A horizontal line drawn from the plane of the mean depth of the shoalest water in the Manasha channel would strike the dam 2.413 feet below the crest of the mean hight of the dam.

Cross-examination by Mr. GILLET:

The rotundity of the water surface for thirty miles is about 514 feet.

By Mr. GILLET. Is there no mechanical contrivance that will determine a level for that distance more accurately than the water level?

Answer. What I mean is, that under favorable conditions of the atmosphere, in an open body of water, the surface level of such body is more reliable than the instruments in ordinary use for such purpose. Mechanical instruments of all descriptions are liable to error from wear, and also personal error from observation as well as from construction of instruments.

Question, by Mr. GILLET. If the water, undisturbed, were standing at the crest of the Menesha dam, how high would the water be at Fond du Lac above the crest of the dam?

Answer. 3.31 of a foot. A precise plane in a line of thirty miles would vary from a water level about sixty feet. I have not made a survey of Lake Winnebago so as to know its surface area. I do not know the amount of water supply to Lake Winnebago, nor the amount supplied by Fox River. I believe the Fox River to be the prin-
381 cipal source of supply. The results on these maps are made from actual observation and calculations by me.

Question, by Mr. GILLET. State the mean depth of the Menasha channel at the point E. F. on the map?

Answer. The mean depth on ninth day of June, 1875, was 4.80 feet from the level of the lake. The measurements were as follows, starting from the north side at E. at the edge, or corner of dock, taken twenty feet apart: 4, 4.8, 5.2, 5.8, 5.8, 5.8, 5.7, 5.7, 5.4, 5.4, 5.4, 4.9, 4.8, 4.9, 5.2, 5.5, 5.8, 5, 5.8, 6, 6, 5.7, 5, 4.6, 4, 3.8, 3.3, 2.9, 2.6, 1.5, coming out at the tree on the edge of shore on south side of channel. Mr. Duchman's water gauge read at that time thirty and three-fourths inches. I do not know what the surface of this bottom was, prior to the deepening the channel.

Mr. HEARDING recalled by General Gill.

The hight of the dam, as given on the map, is the west side of the crib-work. The mean hight of the crib-work is .531 of a foot higher than the mean hight of the dam.

Recross-examination:

The measurements on the crib-work were taken every ten feet on the timbers and on the dam every five feet for the line nearest the bridge, from which measurements the mean hight was obtained. To ascertain the mean hight of the dam I took a series
382 of observations in four lines across the stream. The first line was at a distance of fifteen feet below the bridge. The second line was taken to the west of that at a distance of from seven to nine feet. Third line was taken from seven to nine feet west of the second line. The fourth line was taken at a distance about seven feet west of the bridge.

Question by Mr. GILLET. Taking the third line which you have mentioned, and which is the nearest to the crest of the dam, what is the

difference between the mean hight on that line and the mean hight of the crib-work?

Answer. .303 of a root. The crib-work is the highest. The third line was taken just above the flush-boards, the rod frequently in contact with the flush-boards.

CHARLES HEATH, being duly sworn on behalf of the United States, testified as follows:

I reside in the city of Fond du Lac, and have for seventeen years, that is in the town; in the city but thirteen years. Have been farming all my life but the last six years. I was sixty last March. I have had some experience in draining of slough and pond holes in my life. Never had any streams or ponds to speak of in particular. There used to be a good many of those things fifteen or sixteen years ago here. I should think that about two feet would be ample drainage for clay subsoils. I presume you could drain land at less than two feet, but I would
383 not want it any less than two feet. I don't know as water that would come to within a foot say of the surface before crops were planted and then would go down, I don't think that would injure the land. Water does not injure meadow lands as much as plough lands. I have farmed it in Chautauqua County, N. Y., as well as in this county. I have not generally seen good crops where you have seen water standing in the furrow. In that case you would see yellow wheat and yellow oats.

Cross-examined by J. M. GILLET:

The amount of drainage depends a good deal on the character of the soil. Sandy, gravel'y soil would drain itself. I calculate that two feet would be about enough to drain across a farm, say about eighty or one hundred acres. I never had any experience only in draining these cat-hol's or sloughs. I remember draining one of those sloughs where cat-tails grew as high as your head. I dug a drain from that, I should think about two feet deep, about twenty rods long. If I had a flat level farm and had a drain on it two feet deep, I should think I could plow it all; think that if I had no drain, that then I would plow in the mud. If there was no mouth or fall at the mouth of the ditch, it would not be of much use. Sand like has been spoken about. Clay
384 subsoil will hold water like a jug. Water, in that soil, has to dry up, evaporate, to make it good for use.

By COM. If you had any land, high or low, would you prefer to have the moisture come from rain or below?

A. I should prefer to have moisture from rain than to have the water back up on the land.

G. K. STANCHFIELD, being sworn on behalf of the United States, testified as follows: I reside in the town of Fond du Lac, and have for nineteen years, and resided about one year in the city. I am a farmer; have been farming between forty and fifty years—a little longer than that; was brought up on a farm. I am sixty-seven years of age. I have had some experience in farming lands that have been low. When I resided East, I had a farm surrounded by water. A lake made into it. From my observation, water might stand on hard clay subsoil, within two feet of the surface; think that amount would give good drainage. This is from my observation and experience. Some soils that are springy and cold, would require more drainage than that. I have noticed crops growing on the west side of the lake, where water

stood, I should think, not far from two feet from the surface. There is not much land under cultivation on the west side, yet some very productive land on that side. I shouldn't apprehend that water standing nearer the surface, or even overflowing it out of the growing season, would affect the land any. I don't really know, but think that land only used for grass purposes, might have less drainage. Lands that I have spoken about are for tillable purposes only. I know something about section one. I am not prepared to say anything about the effect the water has upon it.

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Cross-examined by J. M. GILLET:

I farmed it on Lake Androscoggin. I was rather on the side of the lake. The outlet and source of the lake was some distance from where I lived. A portion of my land was subject to overflow. In high water the water would run from the river into the lake and flow over my land. Where land is wet and springy it would require perhaps three or four feet drainage. The importance of soil is to have the ground dry for the crops. Some crops will not stand wet. If the ground is thoroughly wet or soaked, you must have that taken off either by drainage or evaporation. I mean that land should be drained to the depth of two feet. The farm I occupy now is on the ridge back from the low ground. The land I have now has a red clay subsoil, about eight or ten inches below the surface. I have a perfect drainage from reason of slope in the make of the ground; in sloping ground there would be less need of deep drains than the same land low or level. I have seen the low or level lands covered with water. In some places, and on some lands this is a benefit to land and in others it is a detriment. The land does not suffer as much now as it did when I first came here, on account of better drainage. The natural prairie grass here would hold water, but cultivated grasses would let the same water off. I have seen some nice timothy and tame grass in low prairie lands. My opinion is that a good timothy crop will not keep up for any length of time.

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Redirect by CHAS. R. GILL:

I have not had any particular experience as to how far water will affect land in a lateral direction. Have noticed around these sink holes that the land would be affected, say a rod or two from each side of this hole in wet weather. My opinion is that there would not be much benefit to a crop to have a furrow, say some rods from the crop only to the crop in immediate vicinity to the furrow.

In answer to question by the com., the witness said: I do not think that hay raised on low ground is as good as that on dry ground.

GEORGE D. CURTIS called on the part of the United States being duly sworn testified as follows: I reside in the town of Rosendale, and have for thirty years. I am a farmer, and have been since I came to this country. My experience has been in a small way as the many farmers have in low land. I am now cultivating land and get good crops of oats and potatoes on marsh land. Peat marsh where I think the water does stand about one foot below the surface and think that it has been in the three years last past a benefit to the land. The land about which I speak is rolling, and a stream runs through it. We dug down about six feet for the purpose of developing a peat bed and found a gravelly subsoil mixed with clay. The general theory is that you get water too near the surface it sours the land. I know of an instance. A man sold some potatoes down here to Davise's,

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about the largest potatoes I ever saw, on these two peat grounds; I think that the roots of crops will not go deeper than the soil is stirred.

Cross-examined by J. M. GILLETT:

My judgment as to the hight the water stood was from the water in the ditch around the field. That peat was dug and dried and proved to be good fuel. That marsh, this year, looks like a manure bed, free from sand, purely vegetable mould, right west of the station as you go to Ripon. Leibig, and S. W. Johnson were the authors, I spoke about. It was in those works, I think, that I saw that the roots would go about six feet or less. I have seen on land where I have dug post-holes, roots of grass and wheat about eighteen inches below the surface. I have no low, wet prairie-land. Out on the prairie we call low land,
388 marsh. It ain't like your lake-shore land. Right in the middle of my land or marsh there is a large spring, quite a number of them. There is one there about six feet deep.

JOS. KINSMAN called as a witness on the part of the U. S., testified as follows:

I reside in the town of Friendship. Came in there in October, 1848. About first day of May, I came there with my family. This was in 1849. I am a farmer and have been ever since I came into this country. I never had any experience in growing crops on low land until I came here. I found great odds in seasons. In a warm, dry season water will go within a foot of the surface. Seasons like this you will not get a good crop on lands on the lake shore here without more than a foot of drainage. I have a piece of land this side of my house that I have cleared and some seasons when the water would keep up I have got no crops at all. I consider two feet as good and ample drainage for all kind of crops. The subsoil on my farm is clay with some limestone mixed in it. A crop of oats will raise better on those lands than any other crops. I think I have raised wheat with two feet drainage. For timothy and clover you want as good drainage as for cultivated crops. I have redtop within six inches of the water. I don't know how the two feet drainage would hold out, but think that two feet would hold good. My land is on Lake Winnebago, west shore.

389 Cross-examined:

My farm was mostly timbered land. There is a stream running along my land about one and one-half miles, and my experience has been mostly along the ridge on the bank of this stream. This stream, there are two forks of it; one comes in by my timber, the other runs off about one and one-half miles before it empties into the lake. The ridge, on which I live, is about three and one-half feet above the level of the lake. I dug my cellar six feet deep. We took a level to see where the highest water-mark was, and I raised my house two feet above the earth, and we have a six-feet cellar. About eighteen inches of the soil is black, rich soil, and then you reach clay. About four feet down you strike a lighter colored clay. The ground I spoke about cultivating is about eighty to ninety rods from the lake. This is up where the creek or near where the creek enters into the marsh. That land slopes three ways, all but the north end. If the water stands two feet below the surface it will not injure the crops, but it must not raise any. I have raised good crops on that piece of land, corn, oats, potatoes, etc., but water has come upon that after I have planted corn, and it was a great injury to it. It is the warm seasons that will dry off the water; that one can get good crops on the land. It is the water that

will make the crop uncertain and that water coming upon
390 that land even for a few days will greatly injure the land as it will keep the land cold for some time after. This stream, in the the spring of the year, is subject to rise and fall from the lake. The average that the water is distant from the crops, is about three or four rods; that is the water in the stream. There is no odds in the spring of the year or at any time in the distance from the lake shore than from the stream. It will average about fifteen or twenty rods to the bed of the stream from the outside of my crops. It is less distance to the water if anything on the lake-shore side.

Redirect:

On that ridge I cultivate about six acres. This is about on same level with mine (that is my brother-in-law). I have raised the ordinary crops on my land. Most of my land is three-feet drainage, and I have noticed that the crops on that were better than on two-feet drainage, that is in cold seasons; not any difference in common seasons.

By COM. Have you any means of knowing whether the water is higher now than when you came? Have you any marks?

When I came here the marsh where I now live or near there, was covered with stacks of hay. The people had come down from the woods and had cut the hay there. This was in 1848. There was some
391 poplar brush there. I came here then in 1849, about 8th of May. I took my horses and went across that marsh and brought about 800 pounds of goods across the marsh. I cut that year about seventeen tons of hay on the marsh near Long Point and drew it with my team to my place. Capt. Durkee had his lumber landed on the lake-shore and drew it across the marsh. This was all done in 1849. I, the next year, cut a large lot of hay and this was right in front of my house. I stopped, and that night there came on a heavy rain, and the water was a foot deep over the marsh. The water went down in a day or two. Within a short time after that the water commenced to raise on the marsh and kept up. You cannot cross that marsh and get down to the lake-shore without getting above your knees in the water.

F. F. PARSONS called as a witness on the part of U. S., testified as follows:

I reside in town of Fond du Lac; am a farmer; have farmed it more or less all my life; I am 44 years of age; I have lived within six miles of the city 32 years; I have never been located where I could take much observation or have any experience or both in draining lands. My opinion is that one could raise as good crops on lands having a foot or eighteen inches drainage as you could in three feet.
392 In dry seasons when the land is low, there is more moisture there, and there would be some difference in lands there in eighteen inches and in three feet drainage. The low lands would be better then. The average of corps would be about the same. I came here in '43, and noticed the lands along the lake shore from that time to 1849, and since. Was often along from here to Taycheedah. Taycheedah was our trading-post. There has been a change in that shore since '49. I have nothing only general observation, as to how much higher the water is now than then. I think that the water is now from six inches to a foot higher than then. The water is a little above the surface at and between Taycheedah and the bridge. The water is shallow way out into the lake at these points I speak about.

Cross-examined:

I resided then where I first came here in Byron, about six miles from

Fond du Lac. I don't recollect at what time the water raised in the lake. Came to Fond du Lac, twenty years ago. I have no specific marks to show how high the water has raised. I know it has been raised, but cannot say how much. The shore extended out some distance further than it does now. I remember some buildings between the road and the lake. Don't know what they were. Think there was a gravel building there. The Cranz mill, I remember where that stood, is all under water.

393 Redirect:

These buildings were built upon the sand on the lake shore.

WM. H. WALKER, being duly sworn on the part of the defendant, says: I reside in Fond du Lac. Have resided there about thirty years. Have given some attention to agriculture as well as other things during my life. Have read standard authors on the subject of agriculture some. From what I have read and from my observations, think two feet would be ample drainage for most kinds of crops. That is, if the water was permanently two feet below surface of the ground; think water will soak considerable distance by falling gradually. Think it would soak horizontally about one hundred feet. It would depend upon the nature of the soil how far it would soak. I don't think it would soak fifty feet into a clay soil.

Cross-examination by Mr. GILLET:

If the soil were porous or spungy, there would be no limit to the soakage. Capillary attraction exists in porous soil. This attraction is equivalent to the evaporation from the soil; and the amount of evaporation depends upon the condition of the atmosphere. I meant that the drainage should be such as to actually keep the water line two feet below the entire surface. In a large tract of level land, the drainage would depend upon percolation. The drainage of such a tract of
394 land would necessarily depend upon the character of the subsoil. The subsoil of the prairies around Fond du Lac, is mostly red clay. The red clay is not very porous. There are places mixed with sand and gravel that is more porous than those places that are free from sand and gravel. This I know from observation such as digging wells, fountains, etc. With a clay subsoil, and with a vegetable mould covering it to a depth of less than two feet, without ditches, I do not think you would have a drainage of two feet, such as I have spoken of to get the best result for agricultural purposes. This applies to land that is nearly level and without surface drainage. To make such land successfully available for agricultural purposes, it would require drainage by ditching; I mean, to give the best results in the raising of crops. I have formed my opinion more from reading and observation, than from actual experience. My experience has confirmed my opinion in this matter. Have been engaged most of the time for the past thirty years in the practice of medicine. The practice of medicine has been my principal occupation and pursuit. I have read Waring's Elements of Agriculture, and the agricultural reports of the Patent Office. From these works I have formed my opinions, so far as I have formed them from books.

Question by Mr. HUBBELL. Are we to understand that in your
395 opinion, a tract of land that is only two feet above permanent water, is as good for agricultural purposes as if it were more than two feet above water?

Answer. I mean to say if the surface of the land is prepared so as

to take off the surplus surface water, and the ditches so dug as to keep the standing water line actually two feet below the surface, that land is as good for general agricultural purposes as though it was higher. This is my opinion. With a stiff clay subsoil the ditches would need to be within two rods of each other, and running through the entire tract. In order to make this system of drainage available, the ditches must be continually kept open. It would cost three shillings a rod to make open ditches. I consider it desirable to have in a farm, pasture land, meadow land, and grain land. I would not consider the Pumpelly land as desirable for building purposes as though it were higher. If the imaginary tract of land about which I was speaking, if that was down near the Pumpelly tract, I suppose the low parts would be overflowed. If we had floods like they are having in Indiana and other places, think my imaginary tract would become wet sooner than high land. If there was water below this land, raising the water would of course overflow the land if my tract of land was. It would not drain off as quickly on
396 land that has not a complete fall, as on other lands that have.

Redirect examination:

This land being two feet above the level of the lake, if you can keep the water at that hight, I consider that it does not injure the land. Under-draining improves any land. Some land may lie so that there will be a superabundance of water under it; in that case under-draining is a benefit to the land. If you have land four feet above the level and the water is raised two feet, I would not consider that the land is injured at all. We will suppose the land is four feet high, and that you have two feet at the other end, then you can raise crops as good on the low end as on the other. A canal running along the upper end of the section, say two feet below the surface, that would not affect the land. I don't know of but one piece of land around here that is under-drained. Surface-drainage is the only drainage in use around here, except in the one piece I have spoken about.

ALONZO RAYMOND, being sworn on the part of the U. S., testified as follows:

I live here in the city, and have since '54; in the town since '39. I have known section one during all the above time; frequently crossed it. I am a constable now. I was formerly a farmer.

Question. What is the condition of this section compared with what it was when you first knew it as to its saleable qualities?

397 Answer. It is worth a good deal more now than then. It used to be pretty wet in wet seasons, as all our country did around here. I think it is dryer now than it used to be. The whole prairie is dryer now than it used be. In wet seasons we would in some places be all under water. I think it is dryer now than then, because the seasons are dryer. I knew it from '39 to '49, by passing or crossing it at intervals. I do not generally now in passing from here to Taycheedah notice *that* any damage to the land only when the creek overflows it. I think I have not seen as high water there in the last ten years as between '39 and '49. I have not been across it much in the last ten years; more in the last two than in the other eight. Don't think have been across there once a year; perhaps more.

Cross-examined:

The wet seasons caused the high water on that land mostly. It was mostly covered by high grass. Used to put up hay on south side of section. I have known it to be so wet couldn't put up hay. Couldn't

say what year, think in 1846, I put up hay on that section. That was one of our dry seasons. Land was in some places wet. Right by the side of where I mowed there was standing water. I remember the circumstance of the building of the dams. Think I have seen the
398 water prior to that time when the wind was strong in the north fill up the banks of the creek near the old toll-gate. Think I have been down the road when the water was being set back up the creeks by the wind blowing from the north. Can't say to what extent it flowed the land. Think in '51 I saw the water the highest on that section I ever saw it. I can remember riding across it and I had to hold up my feet in the swales to keep them from getting wet. The heavy grass was growing all around here in an early day. The ground where the city now is was covered with grass, and where the ravines were the grass was very high. We used to call all this land around here a wet prairie. Since the land has been improved the country around here has become dryer and much land rendered tillable that was not in a former day. I attribute the dryness of section one to the seasons being dryer than they used to be. I think cultivating makes it dryer. The water shed around that country or section of land is much dryer than it used to be. They cultivate land around Taycheedah that used to stand under water. I am somewhat acquainted with the lands between Taycheedah and the ridge. I do not know exactly where the Sewell farm is, but I know the land all through there. Where I speak of going was north of where Gen. Ruggles used to live. All the prairie around Fond du Lac is much dryer than in an early day.
399 There is less water and more whisky than in an early day. I don't, of my own knowledge, know whether the water is higher in the lake than in an early day. I think the land is too near the level of the lake to allow the stream you see on Sheboygan street, or along there, to run into the lake readily. The old road used to run south of where the present gravel road is now. It came south of Col. Beall's house; then turned kind of, until it came to the sand ridge. It was called at that time the State road or military road.

N. BOARDMAN, recalled by U. S., testified as follows:

I took some levels on section one a few days ago. I know the map of levels as taken by Newton, and found the water one foot two inches lower than when he took them. I took these levels 24th July. He has all those stations where he measured. I took the measure on the road every 100 feet toward the marsh, the same as Newton did on the west line of section. I have been over section one a good deal. The creek is filled up mostly with small willows; in a good many places the creek is clogged up. There is 2.8 fall there; about same depth all along there. I should judge there was about 14 inches fall there. If the width of channel is the same, the same fall in the channel above
400 and below the dam and the same depth, there would be no dam or stoppage of water in the channel. Have known the section one 23 years. I found an end of a box out in the lake from the Geisse steam-mill at Taycheedah. There was two feet four inches of water over the top. I found this on 23d July. I found the waste-weir in Neenah channel 59½ feet long, and from top of the timbers to the floor it was four feet ten inches. I mean from bottom of timbers.

Cross-examined:

My measurement shows only that the water was lower when I took my survey than when Newton took his level of the land of section one. I was across the creek in 1852. There was nothing like as much growth

of willow there then as now. I was here most of '74 and some of '73. I know in those years the country was pretty dry around here. I was down to foot of lake in one of those years. I know it was pretty dry those seasons. The main sources of the Lake Winnebago are the Fox and Wolf. I know of none other rivers in a dry time except a small amount from Fond du Lac River, and small streams. There is always some water in Taycheedah Creek and some from Fond du Lac River. Don't know as lake is supplied by water from fissures under the lake.

401 There is no current at Oshkosh in the Wolf to speak of next to lake. It does not run as rapid at Oshkosh as at Algoma. I have been up the Fox River in summer. There is a pretty strong current in these rivers at Algoma Bridge, and some at Winneconne. I found a box at the Geisse mill. We found a box out there by a pile of stone. It was not a timber because I could run my rod in it. I think it was not a timber because there was nothing under it. It was open on the south side. I should think the prevailing winds would not drive the sand in. We commenced the survey or levels the 3d of June. At that time the water was running over the flush-boards at the dam at Menasha. The water was eight feet above the bed of the stream. It was $5\frac{3}{4}$ feet from water to water. If there was much pouring over the dam the water would pile up some, but at that time there was not much water running over. From the commencement of the stream to the top of the dam the fall was .33; at the Neenah channel the fall was .685. I account for the fall in one channel being more than in the other, on the ground that the channel is lower and that the water is swifter in Neenah channel than in the Menasha channel. The bed of the river rises toward the lake in Menasha channel from the dam $3\frac{1}{2}$ feet.

402 The water at the shallowest point was four feet eight inches deep. The base of the dam below that point is $3\frac{1}{2}$ feet. The water at the dam was eight feet above the bottom of the river.

B. F. MOORE was called by the defendant, and being duly sworn, testified as follows:

Q. You reside in the city of Fond du Lac, do you?
A. I do.
Q. State whether you, at any time, was appointed one of the board of commissioners to condemn certain lands for what is called the Narrow Gauge Railway from here south?
A. I was.
Q. Who were the other members of the commission?
A. Mr. Foster and Mr. Simmons.
Q. All residents of this city?
A. All of them.
Q. When was that commission appointed?
A. I can't tell you just the time.
Q. What year?
A. This year; during the summer of 1876.

By the COURT:

Q. July or August?
A. Yes, sir.

By Mr. POTTER:

Q. Has that commission made its award in that case?
A. They have.

Q. Have you any personal recollection of the value that you
403 fixed on any tracts of land and the location of the tracts?

A. Well, I wouldn't like to speak positively. I came very near the amounts.

Q. Have you any positive knowledge upon the subject?

A. I have not. I have not charged my memory after getting through with it.

Q. I suppose the records will show that fact? You completed that service, did you, and made your awards and the awards have been filed?

A. I suppose so. All the cases that were brought before us.

Q. What extent of country did your investigations cover—commenced at what point and ended at what point?

A. Commencing at the city, at the north line of the city, or near the north line of Scott street, and ending at the county line off south.

Q. You covered all that tract of territory?

A. We didn't go over every piece of land.

Q. All but what you agreed upon?

A. All but what we agreed upon.

Q. Have you any recollection of how many different farms you made compensation for or assessed damages on?

A. I couldn't tell. It was quite a number. Perhaps a dozen, I should think. Perhaps a few more or a few less than that.

Q. What is the character or quality of the soil and location
404 of the land over which this proposed route is to run?

A. I should say it was generally very good.

Q. Well, state as to the elevation above the lake.

A. Generally high.

Q. Good farming land?

A. Yes, sir; I should call it so.

Q. Under cultivation?

A. Yes, sir; most of it.

No cross-examination.

The testimony was here closed. During the progress of the argument by counsel for plaintiff he was about to read to the court a record as follows:

Forty-third Congress, 1st session.—Executive Document No. 256. A letter from the Secretary of War transmitting the draft of a bill to aid improvements of the Wisconsin and Fox Rivers, in the State of Wisconsin, May 22d, 1874.

Ordered to Committee on Commerce and ordered to be printed. Marked Exhibit 21.

Counsel for defendant objected to counsel for plaintiff reading this document in the presence of the jury.

Objection overruled, to which defendant excepted.

Counsel for plaintiff then read the bill to the court.

The following is the language of the document above referred
405 to as read to the jury by the counsel for the plaintiffs, viz:

[Forty-third Congress, 1st session. House of Representatives. Ex. Doc. No. 256.]

WISCONSIN AND FOX RIVERS, IN WISCONSIN.

Letter from the Secretary of War transmitting a draught of a bill to aid the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin.

May 22, 1874.—Referred to the Committee on Commerce and ordered to be printed.

WAR DEPARTMENT, *May* 21, 1874.

The Secretary of War has the honor to acknowledge the receipt of letter of the 6th instant of the Hon. Philetus Sawyer, chairman of the subcommittee on river and harbor bill, informing the department that there are pending before that committee "several matters connected with the right of the government to flow lands by means of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, and affecting the right of the canal company to be relieved from suits brought against it by reason of flowage which took place while the
406 Green Bay and Mississippi Canal Company had control of the improvement; also expenses incurred by the company in maintaining the improvement subsequent to the award of the arbitrators and prior to its acceptance by the company, and the unpaid expenses incident to the arbitration; the theory upon which the award was made being that the United States should pay what it would cost to build the work, which would, of course, include the cost of acquiring the right to flow the lands injuriously affected," &c., and requesting that a draught of a bill be submitted to meet these points and any other that may occur in connection with this improvement, and to report to the House of Representatives for the information of the Committee on Commerce; that this letter was referred to the Assistant Judge-Advocate-General, with directions to consult with such officer as the Chief of Engineers may select, and prepare a draught of an act for such legislation as may be for the interests of the service.

The report of the Assistant Judge-Advocate-General and draught of a bill to aid the improvement of the Wisconsin and Fox Rivers, which are approved, are herewith transmitted for the action of Congress.

WM. W. BELKNAP,
Secretary of War.

407 WAR DEPARTMENT, *Washington, May* 21, 1874.

A letter from the House Committee on Commerce to the Secretary of War, dated April 6, 1874, concerning the improvement of the Wisconsin and Fox Rivers, having been referred to me for the preparation of a bill and a general report upon the points mentioned in said letter, I have the honor to submit the draught of a bill to meet those points, as requested by the committee, together with the following report, which has been delayed at the request of the attorney for the Green Bay and Mississippi Canal Company.

The first point mentioned is "the right of the government to flow lands by means of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin." With reference to this it may be remarked that both the supreme court of the State of Wisconsin and the Supreme Court of the United States have held that damage to property occasioned by flowage above high-water mark in the improvement by dams

of a public navigable river is a taking or seizure of lands within the constitutional inhibition against taking private property for public use without compensation previously made.

The second point is "the right of the canal company to be relieved from suits brought against it by reason of flowage which took place while the Green Bay and Mississippi Canal Company had control of the improvement, * * the theory upon which the award was made being that the United States should pay what it would cost to build the work, which would, of course, include the cost of acquiring the right to flow the lands injuriously affected." With reference to this point it may be remarked that the language of the arbitrators in their report to the Secretary of War, dated November 15, 1871, indicating the basis upon which the award was made, is that the improvement "would seem to be worth as much as it would cost to build such works at the present time, deducting a reasonable sum for depreciation by wear and tear." It would be in accordance with that principle for the government to assume any additional element of necessary cost, which, if ascertained and presented, would have been allowed by the board. At the time the hearing before the arbitrators was had, one suit only was pending against the company for the recovery of compensation for damages by flowage, occasioned by the dams of the company. This suit was at that time decided by the circuit court of the United States in favor of the company, and therefore no estimate of this element of cost was submitted to the arbitrators. Subsequently to the award the Supreme Court of the United States reversed the decision of the circuit court. The conclusion, therefore, of the attorney for the canal company is believed to be subtantially sound.

That inasmuch as the flowage question was not considered by the arbitrators, having necessarily arisen wholly since the award, and the amount to be paid for the right of flow being a part of what it would cost the government to build the works anew, which, according to the rule laid down by the arbitrators, the government was by statute required to pay, that sum is not embraced in the award made by them, and inasmuch as the settlement of past and future flowage can be best made together, it is * * * right and in the public interest that the government should provide for all past flowage not outlawed, and take charge of the litigation now pending.

The third point is "expenses incurred by the company in maintaining the improvement subsequent to the award of arbitrators, and prior to its acceptance." With regard to this it is believed that the United States is under no legal obligation to assume or repay the current expenses of operating the work. The object of the arbitration was simply to ascertain what would be a just price in case the government should decide to purchase the improvement. The company agreed to sell for such price as the arbitrators should recommend. After their recommendation the government decided to purchase, and in pursuance of that decision the property was transferred. Down to the date of formal transfer the title was in the company, and upon them devolved the current expenses in the absence of any agreement to the contrary. But the company ought not to be a loser by reason of making any repairs which the government would have been obliged to make if it had taken the property at the date of the award, and which may have materially enhanced the value of the works.

The fourth point refers to "the unpaid expenses incident to the arbitration." An appropriation was made June 10, 1872, to pay all the expenses incident to the arbitration, except the compensation of the

arbitrator selected by the canal company and the fee of their counsel. Since the principal object of the proceeding was to furnish information to guide the judgment of the government, and since Congress has seen fit to pay the general expenses of the board, it would seem to be in harmony with that action to pay the compensation of the arbitrator selected by the company. The company's counsel fee need not be discussed, since it is understood that no application will be made to have it refunded.

The fifth point relates to the "legislation necessary to adjust
411 conflicting rights between the United States and the owners of the water power." With regard to this matter the attorney for the canal company suggests that "as there is no present pressing necessity for legislation relating to conflicts of interest between water-power owners and the public, the matter being one of difficulty, can be more fully considered if postponed to a later session of Congress." It is understood that all the water leases contain a proviso that the use of the water shall not interfere with the purposes of navigation.

The judge, in the first instance, of the water necessary for navigation should be the officer in charge of the work, and a properly-guarded clause determining this point would not interfere with further legislation calculated to prevent or adjust conflicts of interest concerning the use of the water.

W. M. DUNN,
Assistant Judge-Advocate-General.

The Hon. SECRETARY OF WAR.

A bill to aid the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled, That whenever, in the prosecution and maintainance of the improvement of the Wisconsin and Fox
Rivers, in the State of Wisconsin, it becomes necessary or proper
412 to take possession of any lands, or the right of way over any lands, for canals, cut-offs, storehouses, and accessory works of improvement, or the right to permanently flow, saturate, or injure any lands or other property, or to use any earth, quarries, or other material lying adjacent or near to the line of said improvement, and needful for its prosecution or maintainance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after having first paid, or secured to be paid, the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies for adjudging the value of private property needed for railway purposes, or by commissioners appointed and directed by the Secretary of War; provided, however, that when the owner of such property shall fix a price for the same, which, in the opinion of the said officer in charge, shall be reasonable, he may take the same at such price without further delay, and in case of real or mixed property may receive a conveyance thereof in fee to the United States. In case any lands or other property has been, or is now, flowed or injured by means of any part of the works of said improvement heretofore constructed, for which compensation has not been made and is legally owing, and, in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered, the amount of such com-
413 pensation, including all lawful damages for past flowage, may be ascertained in like manner, and upon like conveyances payment may be made. The Secretary of War may employ a competent at-

torney to represent the interests of the United States in such legal proceedings as may be had under this act, and such as are now pending for flowage damages hereinbefore occasioned.

SEC. 2. And be it further enacted that a portion of the appropriations made, or to be made, for the prosecution of the improvement aforesaid, not exceeding in amount twenty-five thousand dollars, may be applied in payment for the property taken and used as aforesaid, and in payment of the compensation of the arbitrator selected by the company, and in payment of expenses incurred in making necessary repairs upon the works of improvement subsequent to the making and prior to the acceptance of the award of arbitrators, under which such works were acquired by the United States, after first applying thereto any excess the full proceeds of tolls then received over and above the expenses incurred in protecting and operating said works; all expenses to be audited by the Secretary of War.

SEC. 3. And be it further enacted that the Secretary of War is hereby authorized to prescribe such regulations as may, in his judgment,
414 be necessary in regard to the use of water on the Fox and Wisconsin Rivers, Wisconsin, for manufacturing or other purposes, not inconsistent with the rights of private parties.

After the close of the evidence in the case, the counsel for the defendant requested the court to instruct the jury as follows:

1st. If the jury find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha was constructed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam raising the water in the lake, more than twenty years prior to the filing of the petition in this action, then the action is barred, and the plaintiffs cannot recover.

2d. If the jury find from the evidence that the dam at Menasha was constructed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam at Menasha raising the waters in the lake more than twenty years prior to the 18th day of September, 1872, then the action is barred, and the plaintiffs cannot recover.

3rd. To entitle the plaintiffs to recover, the jury must find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha is the property of the defendant, and is maintained by it.

4th. The plaintiffs cannot recover in this action unless it ap-
415 pear affirmatively from the evidence that in the opinion of the officer in charge of the improvement of the Fox and Wisconsin Rivers it is not prudent that the dam across the north channel or outlet of Lake Winnebago at Menasha be lowered.

5th. The evidence shows, and there is no evidence to the contrary, that the dam across the south channel or outlet of Lake Winnebago at Neenah was built and is owned and maintained wholly by private parties for hydraulic purposes, and that the defendant never owned nor maintained the same.

6th. To entitle the plaintiffs to recover in this action the jury must find from the evidence that if the dam at Neenah had never been constructed the dam across the north channel or outlet of Lake Winnebago at Menasha as constructed, would have raised the waters in Lake Winnebago and caused the same to flow the lands of the plaintiffs to their injury.

7th. If the jury find for the plaintiffs that the lands in question are submerged, injured, or destroyed by reason of the waters in Lake Win-

nebago having been raised above their natural level and flowing upon the lands of the plaintiffs, and that such submerging, injury, or destruction was the necessary and natural result of the erection of the dam across the north channel or outlet of Lake Winnebago at Menasha, then
416 the true measure of damages is the value of said lands at the time the same were so submerged, injured, or destroyed, with interest on that sum.

8th. If the jury find from the evidence that the lands described in the petition of the plaintiffs were flowed, injured, or destroyed by the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago prior to the purchase of said lands by the plaintiff Gray, and to the same extent before said purchase as they were at the time of filing said petition, then there is a misjoinder of parties plaintiff, and the plaintiffs cannot recover in this action.

9th. There is a non-joinder of parties plaintiff in this action in this, that J. C. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and Mary S. Pumpelly, heirs at law of George J. Pumpelly, deceased, are not made parties plaintiff, and for that reason the plaintiffs cannot recover.

10th. If the jury find from the evidence that the lands of the plaintiffs described in said petition were flowed, injured, or destroyed, and that said flowing, injury, or destruction was from natural causes, and not in consequence of the construction of the dam at Menasha, and the raising of waters in the Lake Winnebago thereby, then the plaintiffs cannot recover.

11th. If the jury find for the plaintiffs that their lands described in the petition in this action are damaged by reason of the con-
417 struction of the dam at Menasha and the raising of the waters in Lake Winnebago, and that the defendant is liable therefor, then the jury should consider and ascertain what benefits, if any, have accrued to adjoining lands of the plaintiffs in consequence of the improvement of the Fox and Wisconsin Rivers, and their verdict should be for the excess only, in case they find the damages more than the benefits.

The court gave the first, second, third, fifth, tenth, and eleventh instructions asked by the defendant, and refused to give the fourth, sixth, seventh, eighth, and ninth instructions; to which the defendant duly excepted.

The court charged the jury as follows:

The only assistance I can offer you in the determination of this action is to state to you the law which you are to apply to and by which you are to be governed in deciding the questions now to be submitted for your consideration.

The action or proceeding has been instituted by the plaintiffs to recover for damages which they claim they have sustained by reason of the flowage of the lands described in the complaint or petition herein, caused, as they claim, by the erection and maintainance of the Menasha dam by the defendant and its grantors; that is, the dam across the north channel or outlet of Lake Winnebago at Menasha.

418 If you find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha was constructed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam raising the water in the lake, more than twenty years prior to the filing of the petition in this action, then the action is barred by prescription, and the plaintiff cannot recover.

If you find from the evidence that the dam at Menasha was con-

structed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam at Menasha raising the waters in the lake, more than twenty years prior to the 18th day of September, 1872, then the action is barred and the plaintiffs cannot recover.

To entitle the plaintiffs to recover, you must find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha is the property of the defendant, the United States, and is maintained by it.

The evidence shows, and there is no evidence to the contrary, that the dam across the south channel or outlet of Lake Winnebago at Neenah was built and is owned and maintained wholly by private parties for hydraulic purposes, and that the defendant never owned nor maintained the same.

If you find from the evidence that the lands of the plaintiffs described in said petition were flowed, injured, or destroyed, and
419 that said flowing, injury, or destruction was from natural causes, and not in consequence of the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago thereby, then the plaintiffs cannot recover.

If you find for the plaintiffs that their lands described in the petition in this action are damaged by reason of the construction of the dam at Menasha and the raising of the waters in Lake Winnebago, and that the defendant is liable therefor, then you should consider and ascertain what benefits, if any, have accrued to adjoining lands of the plaintiffs in consequence of the improvement of the Fox and Wisconsin Rivers, and your verdict should be for the excess only, that is, the difference between damages and benefits, in case you find the damages more than the benefits.

If you find, from the evidence given in this cause, that in the prosecution or maint*ai*nance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, the lands specified in the petition of the plaintiffs were, on the 3d day of March, 1875, and have since been, flowed or injured by means of the dam at Menasha, across the outlet of Lake Winnebago, as specified in plaintiffs' petition, for which compensation was, on the 3d day of March, 1875, legally owing, and, in
420 the opinion of the officer in charge, it was not prudent that the dam or dams causing such overflow or injury be lowered, then this proceeding is lawfully instituted, and if you are satisfied from the evidence that the lands described in the petition were and are injured, as set forth in said petition, the plaintiffs are entitled to recover in this proceeding.

The measure of damages which you will find, if you find for the plaintiffs, is—

1st. The depreciated value of the use of the land by means of injuries thereto, from soakage and flowage occasioned by the dam at Menasha down to the time when you shall find that the lands were taken by means of such flowage, not exceeding six years before April 21, 1875, the time of filing the petition.

2d. The value of the land so flowed at the time you shall so find they were taken by means of such flowage, with interest on the last-named sum to the time of finding your verdict. The aggregate amount of these two items of damages will be your verdict if you find for the plaintiff'. If you find for plaintiffs your verdict will be, "We find for plaintiffs, and assess their damages at $\$$." If you find for defendant, we find for defendant.

After the charge of the court the jury retired, and afterwards came

into court and rendered a verdict in favor of the plaintiffs for
421 the sum of ten thousand dollars damages. Thereupon the counsel for the defendant moved the court to set the verdict aside, and grant a new trial on the ground that the verdict was contrary to the law and evidence in the case and that the damages were excessive. The court overruled the motion, and rendered judgment upon the verdict; to which ruling of the court the counsel for the defendant duly excepted.

The counsel for the defendant also filed with the clerk of said court on the next day after the verdict was rendered written exceptions to the charge of the court to the jury in the following language:

Now comes the defendant, the United States, by its counsel, and excepts to the charge of the judge in this action, wherein he charges the jury as follows: "If you find from the evidence given in this action that in the prosecution or maintenance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, the lands specified in the petition of the plaintiffs were, on the 3d day of March, 1875, and have since been flowed or injured by means of the dam at Menasha across the outlet of Lake Winnebago, as specified in the plaintiffs' petition, for which compensation was on the 3d day of March, 1875, legally
422 owing, and in the opinion of the officer in charge it was not prudent that the dam or dams causing such overflow or injury be lowered, then this proceeding is lawfully instituted; and if you are satisfied from the evidence that the lands described in the petition were and are injured, as set forth in said petition, the plaintiffs' are entitled to recover." The defendant, the United States, by its counsel, also excepts to the following instructions given to the jury by said court:

"The measure of damages which you will find, if you find for the plaintiffs, is

"1st. The depreciated value of the use of the land by means of injuries thereto from soakage and flowage occasioned by the dam at Menasha, down to the time when you shall find that the lands were taken by means of such flowage, not exceeding six years before April 21, 1875, the time of filing the petition.

"2d. The value of the lands so flowed at the time you shall so find they were taken by means of such flowage, with interest on the last-named sum to the time of finding your verdict. The aggregate amount of these said items of damage will be your verdict if you find for the plaintiffs."

The defendant, the United States, also, by its counsel, excepts to the ruling and decision of said judge wherein said judge refused to
423 charge the jury, as requested by the defendant, as follows:

"The plaintiffs cannot recover in this action unless it appear affirmatively from the evidence that in the opinion of the officer in charge of the improvement of the Fox and Wisconsin Rivers it is not prudent that the dam across the north channel or outlet of Lake Winnebago at Menasha be lowered."

The defendant, the United States, also, by its counsel, excepts to the ruling and decision of said judge wherein said judge refused to charge the jury, as requested by the defendant, as follows:

"To entitle the plaintiffs to recover in this action, the jury must find from the evidence that if the dam at Neenah had never been constructed the dam across the north channel or outlet of Lake Winnebago at Menasha as constructed would have raised the waters in Lake Winnebago, and caused the same to flow the lands of the plaintiffs, to their injury."

The defendant, the United States, by its counsel, also excepts to the ruling and decision of said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"If the jury find for the plaintiffs that the lands in question are submerged, injured, or destroyed by reason of the waters in Lake
424 Winnebago having been raised above their natural level and flowing upon the lands of the plaintiffs, and that such submerging, injury, or destruction was the necessary and natural result of the erection of the dam across the north channel or outlet of Lake Winnebago at Menasha, then the true measure of damages is the value of said lands at the time the same were so submerged, injured, or destroyed, with interest on that sum."

The defendant, the United States, by its counsel, also excepts to the ruling and decision of said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"If the jury find from the evidence that the lands described in the petition of the plaintiffs were flowed, injured, or destroyed by the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago prior to the purchase of said lands by the plaintiff Gray, and to the same extent before said purchase as they were at the time of filing said petition, then there is a misjoinder of parties plaintiff, and the plaintiffs cannot recover in this action."

The defendant, the United States, by its counsel, also excepts to the ruling and decision of said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"There is a non-joinder of parties plaintiff in this action in this, that J. C. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and
425 Mary S. Pumpelly, heirs at law of George J. Pumpelly, dec'd, are not made parties plaintiff, and for that reason the plaintiffs cannot recover."

Jan'y 4, 1878.

R. L. D. POTTER,
Attorney for Defendant.

426 STATE OF WISCONSIN,
Fond du Lac County:

In circuit court.

FRANK L. JONES, ADMINISTRATOR OF THE estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, plaintiffs,
against
THE UNITED STATES OF AMERICA, DEFENDANT.

It is hereby stipulated by and between the parties to this action that the annexed and foregoing be signed by the judge as the case and bill of exceptions in the action above entitled without other or further notice, and that the maps, profiles, and surveys used on the trial of said action, and marked as Exhibit by the reporter, be, and the same hereby are, made a part of this bill of exceptions, and may be used on the argument of this cause in the Supreme Court in the same man-

ner and to the same effect as though incorporated at length in this bill of exceptions.

Dated January 31, 1878.

GILLET & HAMMOND,
Att'ys for Pl'ffs.
R. L. D. POTTER,
Attorney for Defendant.

427 The foregoing is all the evidence taken on the trial and in the action above entitled, as well as the findings of the court and the exceptions of the defendant, and because none of the said exceptions so taken and made upon the trial of the said action do appear of record herein, the said circuit judge, in pursuance of the foregoing stipulation of the parties and in accordance with the facts, hath to this bill of exceptions set his hand and seal this 31st day of January, 1878.

CAMPBELL McLEAN, *Judge.* [SEAL.]

428 In the circuit court, Fond du Lac County.

JAMES K. PUMPELLY ET AL.
against
THE UNITED STATES.

Now comes the defendant, the United States, by its counsel, and excepts to the charge of the judge in this action, wherein he charged the jury as follows:

"If you find from the evidence given in this action that in the prosecution or maintenance of the improvement of the Wisconsin & Fox Rivers, in the State of Wisconsin, the lands specified in the petition of the plaintiffs were, on the 3d day of March, 1875, & have since been, flowed or injured by means of the dam at Menasha, across the outlet of Lake Winnebago, as specified in the plaintiffs' petition, for which compensation was, on the 3d day of March, 1875, legally owing, and in the opinion of the officer in charge it was not prudent that the dam or dams causing such overflow or injury be lowered then this proceeding is lawfully instituted, and if you are satisfied from the evidence that the lands described in the petition were and are injured as set forth in said petition, the plaintiffs are entitled to recover in this proceeding."

The defendant, the United States, by its counsel, also excepts to the following instructions given to the jury by said court:

429 "The measure of damages which you will find, if you find for the plaintiffs, is:

"1st. The depreciated value of the use of the land by means of injuries thereto from soakage and flowage, occasioned by the dam at Menasha, down to the time when you shall find that the lands were taken by means of such flowage, not exceeding six years before April 21, 1875, the time of filing the petition.

"2d. The value of the lands so flowed, at the time you shall so find they were taken by means of such flowage, with interest on the last-named sum to the time of finding your verdict—the aggregate amount of these said items of damage will be your verdict, if you find for the plaintiffs."

The defendant, the United States, also, by its counsel, excepts to the ruling and decision of said judge wherein said judge refused to charge the jury, as requested by the defendant, as follows:

"The plaintiffs cannot recover in this action unless it appear affirmatively from the evidence that in the opinion of the officer in charge of

the improvement of the Fox and Wisconsin Rivers it is not prudent that the dam across the north channel or outlet of Lake Winnebago at Menasha be lowered."

The defendant, the United States, also, by its counsel, excepts
430 to the ruling and decision of said judge wherein said judge refused to charge the jury, as requested by the defendant, as follows:

"To entitle the plaintiffs to recover in this action, the jury must find from the evidence that if the dam at Neenah had never been constructed the dam across the north channel or outlet of Lake Winnebago at Menasha as constructed would have raised the waters in Lake Winnebago, and caused the same to flow the lands of the plaintiffs, to their injury."

The defendant, the United States, also, by its counsel, excepts to the ruling and decision of said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"If the jury find for the plaintiffs that the lands in question are submerged, injured, or destroyed by reason of the waters in Lake Winnebago having been raised above their natural level and flowing upon the lands of the plaintiffs, and that such submerging, injuring, or destruction was the necessary and natural result of the erection of the dam across the north channel or outlet of Lake Winnebago at Menasha, then the true measure of damages is the value of said lands at the time the same were so submerged, injured, or destroyed, with interest on that sum."

The defendant, the United States, by its counsel, also excepts
431 to the ruling and decision of said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"If the jury find from the evidence that the lands described in the petition of the plaintiffs were flowed, injured, or destroyed by the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago prior to the purchase of said lands by the plaintiff Gray, and to the same extent before said purchase as they were at the time of filing said petition, then there is a misjoinder of parties plaintiff, and the plaintiffs cannot recover in this action."

The defendant, the United States, by its counsel, also excepts to the ruling and decision of the said judge wherein he refused to charge the jury, as requested by the defendant, as follows:

"There is a non-joinder of parties plaintiff in this action in this, that J. C. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and Mary S. Pumpelly, heirs at law of George J. Pumpelly, deceased, are not made parties plaintiff, and for that reason the plaintiffs cannot recover."

After the jury had rendered their verdict for the plaintiffs and before judgment, and on the same day that the verdict was rendered, the counsel for the defendant moved the court to set aside the verdict of the jury and grant a new trial, on the ground that the verdict
432 was contrary to the law and evidence in the case, and that the damages were excessive. The court overruled the motion and gave judgment upon the verdict; to which ruling and decision of said court the defendant, by its counsel, duly excepted.

When this cause was called in open court for trial, and before any proceedings were had by either party, and before the jury was empanneled, the defendant, by its counsel, objected to the jurisdiction of the court, on the ground that the court had no lawful authority to try this case, the United States of America being a party thereto.

The court overruled the objection, and decided that he had lawful

authority and jurisdiction to try the case and entertained jurisdiction thereof; to which ruling and decision of said court, the defendant, the United States, by its counsel, duly excepted.

Dated December 2, 1876.

R. L. D. POTTER,
Special Ass't Att'y Gen'l and Att'y for Defendant.

(Indorsed:) Circuit court Fond du Lac County. James K. Pumpelly et al. against The United States. Deft's bill of exceptions. Filed Dec. 2, 1876. W. W. Kenna, clerk. R. L. D. Potter, special assistant and attorney for def't.

433 Fond du Lac circuit court.

JAMES K. PUMPELLY, EDWIN C. GRAY, AND Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased,
vs.
THE UNITED STATES OF AMERICA.

The issues in this action having been brought on for trial before the Hon. Campbell McLean, judge of the 4th judicial circuit, State of Wisconsin, and a jury at a general term of this court held on the 2d Monday of November, 1876, and the issues having been tried, and a verdict for the plaintiffs having been duly rendered on the 1st day of December, 1876, and their costs having been adjusted at forty $\frac{81}{100}$ dollars.

Now, on motion of Gillet & Hammond, att'ys for said plaintiffs, it is adjudged that said plaintiffs recover of said defendant ten thousand dollars, found by the jury, with forty $\frac{81}{100}$ dollars costs.

Dated December 13th. 1876.

By the court.

CAMPBELL McLEAN, *Judge.*

(Indorsed:) Fond du Lac circuit. James K. Pumpelly et al. vs. The United States of America. Judgment. Filed Aug. 23, 1877. James Russell, clerk.

434 In circuit court, Fond du Lac County.

JAMES K. PUMPELLY ET AL.
vs.
THE UNITED STATES.

The only assistance I can afford you in the determination of this action is to state to you the law which you are to apply to and by which you are to be governed in deciding the questions now to be submitted for your consideration.

The action or proceeding has been instituted by the plaintiff' to recover for damages, which they claim they have sustained by reason of the flowage of the lands described in the complaint or petition herein, caused, as they claim, by the erection and maintenance of the Menasha dam by the defendant and its grantors; that is, the dam across the north channel or outlet of Lake Winnebago at Menasha.

If you find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha was constructed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam raising the water in the lake, more than twenty years prior to the filing of the petition in this action, then the action is barred by prescription, and the plaintiffs cannot recover.

435 If you find from the evidence that the dam at Menasha was constructed, and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam at Menasha raising the waters in the lake, more than twenty years prior to the 18th day of September, 1872, then the action is barred, and the plaintiffs cannot recover.

To entitle the plaintiffs to recover you must find from the evidence that the dam across the north channel or outlet of Lake Winnebago at Menasha is the property of the def't, the United States, and is maintained by it.

The evidence shows, and there is no evidence to the contrary, that the dam across the south channel or outlet of Lake Winnebago at Neenah was built and is owned and maintained wholly by private parties for hydraulic purposes, and that the defendant never owned nor maintained the same.

If you find from the evidence that the lands of the plaintiffs described in said petition were flowed, injured, or destroyed, and that said flowing, injury, or destruction were from natural causes, and not in consequence of the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago thereby, then the plaintiffs cannot recover.

436 If you find for the plaintiffs that their lands described in the petition in this action are damaged, by reason of the construction of the dam at Menasha and the raising of the waters in Lake Winnebago, and that the defendant is liable therefor, then you should consider and ascertain what benefits, if any, have accrued to adjoining lands of the plaintiff in consequence of the improvement of the Fox and Wisconsin Rivers, and your verdict should be for the excess only, that is, the difference between damages and benefits, in case you find the damages more than the benefits.

If you find, from the evidence given in this cause, that in the prosecution or maintenance of the improvement of the Wisconsin & Fox Rivers, in the State of Wisconsin, the lands specified in the petition of the plaintiffs, were on the 3d day of March, 1875, and have since been flowed or injured by means of the dam at Menasha, across the outlet of Lake Winnebago, as specified in the plaintiffs' petition, for which compensation was on the 3d day of March, 1875, legally owing, and in the opinion of the officer in charge, it was not prudent that the dam or dams causing such overflow or injury be lowered, then this proceeding is lawfully instituted; and if you are satisfied from the evidence that the lands described in the petition were and are injured as set forth in said petition, the plaintiffs are entitled to recover in this proceeding.

437 The measure of damages which you will find, if you find for the plaintiff, is,

1st. The depreciated value of the use of the land by means of injuries thereto, from soakage and flowage, occasioned by the dam at Menasha, down to the time when you shall find that the lands were taken by means of such flowage, not exceeding six years before April 21st, 1875, the time of presenting the petition.

2nd. The value of the land so flowed at the time you shall so find, they were taken by means of such flowage, with interest on the last named sum, to the time of finding your verdict.

The aggregate amount of these said items of damages will be your verdict, if you find for the plaintiff.

If you find for pl'ffs your verdict will be, "We find for pl'ffs, and assess their damages at $."

If you find for def't, "We find for def't."

(Indorsed:) Circuit court, Fond du Lac County. James K. Pumpelly et al. vs. The United States. Charge of the court to the jury. Filed Dec. 2, 1876. M. M. Kenna, clerk.

438 In circuit court, Fond du Lac County.

JAMES K. PUMPELLY, ET AL.
vs.
THE UNITED STATES.

The counsel for the defendant in this action asks the court to instruct the jury as follows:

1st. If the jury find from the evidence that the dam across the north channel or outlet of Lake Winnebago, at Menasha, was constructed, and the lands of the plaintiffs were flowed and injured or destroyed, by reason of the dam raising the water in the lake, more than twenty years prior to the filing of the petition in this action, then the action is barred and the plaintiffs cannot recover.

Given.

2d. If the jury find from the evidence that the dam at Menasha was constructed and the lands of the plaintiffs were flowed and injured or destroyed by reason of the dam at Menasha, raising the waters in the lake, more than twenty years prior to the 18th day of September, 1872, then the action is barred, and the plaintiffs cannot recover.

Given.

3d. To entitle the plaintiffs to recover, the jury must find from the evidence, that the dam across the north channel or outlet of Lake Winnebago, at Menasha, is the property of the defendant and is maintained by it.

Given.

439 4th. The plaintiffs cannot recover in this action unless it appear affirmatively from the evidence that in the opinion of the officer in charge of the improvement of the Fox and Wisconsin rivers, it is not prudent that the dam across the north channel or outlet of Lake Winnebago at Menasha, be lowered.

Not given & def't ex.—C. McL.

5th. The evidence shows, and there is no evidence to the contrary, that the dam across the south channel or outlet of Lake Winnebago, at Neenah was built and is owned and maintained wholly by private parties for hydraulic purposes, and that the defendant never owned nor maintained the same.

Given.

6th. To entitle the plaintiffs to recover in this action, the jury must find from the evidence that if the dam at Neenah had never been constructed, the dam across the north channel or outlet of Lake Winnebago, at Menasha, as constructed, would have raised the waters in Lake Winnebago and caused the same to flow the lands of the plaintiffs to their injury.

Not given & def't ex.—C. McL.

7th. If the jury find for the plaintiffs that the lands in question are submerged, injured, or destroyed by reason of the waters in Lake Winnebago having been raised above their natural level and flowing upon the lands of the plaintiffs and that such submerging, injury or destruction was the necessary and natural result of the erection of the

440 dam across the north channel or outlet of Lake Winnebago at Menasha, then the true measure of damages is the value of said lands at the time the same were so submerged, injured or destroyed, with interest on that sum.

Not given, & def't ex.—C. McL.

8th. If the jury find from the evidence that the lands described in the petition of the plaintiffs were flowed, injured, or destroyed by the construction of the dam at Menasha and the raising of the waters in Lake Winnebago prior to the purchase of said lands by the plaintiff, Gray, and to the same extent before said purchase as they were at the time of filing said petition, then there is a misjoinder of parties plaintiff, and the plaintiffs cannot recover in this action.

Not given & def't ex.—C. McL.

9th. There is a non-joinder of parties plaintiff in this action, in this, that J. C. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and Mary S. Pumpelly, heirs-at-law of George J. Pumpelly, deceased, are not made parties plaintiff, and for that reason the plaintiffs cannot recover.

Not given & def't ex.—C. McL.

10th. If the jury find from the evidence that the lands of the plaintiffs described in said petition were flowed, injured, or destroyed, and that said flowing, injury, or destruction was from natural causes, and not in consequence of the construction of the dam at Menasha and the raising of the waters in Lake Winnebago thereby, then the plaintiffs cannot recover.

Given.

441 11th. If the jury find for the plaintiffs that their lands described in the petition in this action are damaged by reason of the construction of the dam at Menasha and the raising of the waters in Lake Winnebago, and that the defendant is liable therefor, then the jury should consider and ascertain what benefits, if any, have accrued to adjoining lands of the plaintiffs in consequence of the improvement of the Fox and Wisconsin rivers, and their verdict should be for the excess only, in case they find the damages more than the benefits.

Given.

(Indorsed:) Circuit court, Fond du Lac County. James K. Pumpelly et al. against The United States. Defendant's request of charges to jury. Filed Dec. 2, 1876. M. M. Kenna, clerk.

442 PUMPELLY } *vs.* U. S. }

1. K. DILTS.
2. *ALEX. MCDONALD, EX.
3. BENJ. PATCHETT.
4. *L. CARREY, D. 3.
5. STEPHEN BELL.
6. E. C. AERHART.
7. PETER HERRIG.
8. C. R. PENNG.
9. PETER WEIDNER.
10. MATHIAS LAUSER.
11. T. C. HILL.
12. *H. D. GRANES, D. 2.
12. *CHARLES WILSON, D. 1.
*JOHN WILL, PL'FF.
*W. B. CONOVER, EX.
GEORGE HOBBS.
AUGUST PITZEN.
M. W. GAGE.

* Name erased.

(Indorsed:) In circuit court, Fond du Lac County. James K. Pumpelly et al. ag't The United States. Jury list. Filed Nov. 24, 1876. M. M. Kenna, clerk.

443 STATE OF WISCONSIN,
Fond du Lac County, ss:

In circuit court.

To John Nichols, Luther Holmes, Geo. Radford, Edward Pier, B. F. Moore:

We command you that, laying aside all and singular your business and excuses, you be and appear before the circuit court for said county, at the court-house, in the city of Fond du Lac, forthwith and from day to day thereafter, then and there to give evidence in a cause wherein J. K. Pumpelly et als. are plaintiffs and The United States of America is defendant, on behalf of the deft. Hereof fail not, under the penalty that will fall thereon.

Witness the Hon. Campbell McLean, judge of said court, at Fond du Lac, the 28 day of Nov., A. D. 1876.

[SEAL.] M. M. KENNA,
Clerk of Circuit Court.

444 (Indorsed:) Court subpœna. J. K. Pumpelly et al. vs. The United States. Filed Nov. 28, 1876. W. W. Kenna, clerk of court Fond du Lac County. J. K. Pumpelly et al. vs. The United States.

I hereby certify that I did, on the 28th November, A. D. 1876, subpœna the within-named John Nichols, Luther Holmes, George Radford, Edward Pier, & B. F. Moore, in the city of Fond du Lac & State of Wisconsin, by reading to each of them, personally, the within subpœna, and by paying to each of them one dollar, the am't of fees placed in my hands.

Fees for service, 1.25; travel, 1.00; am't paid witnesses, 5,00—$7.25.

Dated Fond du Lac, Nov. 28, 1876.

H. R. HILL, *Sheriff.*
Per R. BLOOM, *Deputy.*

445 In the matter of the application of Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly, Edwin C. Gray, Herman C. Geise, *and Herman C. Geise*, and Herman C. Geise, surviving executor of the last will & testament of F. William Geise, deceased, for the appointment of commissioners of appraisal for the purpose mentioned in their petition heretofore, to wit, on the 21st day of April, 1875, filed in the office of the clerk of the circuit court of Fond du Lac County, Wis.

To above-named parties, Gillet and Hammond, their attorneys, and the clerk of said court:

Notice is hereby given that the United States of America appeals to the circuit court of Fond du Lac County, Wis., from the award of the commissioners of appraisal heretofore made in this case, and filed in the office of the clerk of said court on the eighteenth day of August, A. D. 1875.

Dated Sept. 14th, 1875.

EDWARDS PIERREPONT,
Attorney-General.
Per CHAS. R. GILL, *Special Assistant.*

(Indorsed:) Circuit court Fond du Lac County. James K. Pumpelly et al., vs. The United States. Notice of appeal. Filed Sept. 14, 1875. M. M. Kenna, clerk.

446 Whereas, James K. Pumpelly and Edwin C. Gray did present to the Hon. Campbell McLean, judge of the 4th judicial circuit of Wisconsin, their filed and verified petition with the clerk of the circuit court in and for the county of Fond du Lac and State of Wisconsin, representing amongst other things, that they were the owners of certain lands and premises therein and hereinafter described, to wit: Section one (1), town. fifteen (15), range seventeen (17), in Fond du Lac County, Wisconsin, except the south half of the southwest quarter of the southwest quarter thereof, and that said lands and premises were and had been overflowed and injured by reason of the construction and maint*ai*nance of the dam at Menasha on the northern outlet of Lake Winnebago, a dam maintained by the United States Government for the purpose of the improvement of the Fox River in this State; and whereas, said petition was on the 4th day of May, A. D. 1875, duly presented to the Hon. Campbell McLean, judge of the said court, at the court-house in the city of Fond du Lac, and notice duly given to the Department of Justice of the United States that said petition would at that time and place be presented to said court, and application made by said petitioners for the appointment of three commissioners, pursuant to the laws of the United States and the State of Wisconsin in such case made and provided, and pursuant to the prayer of said petition to appraise the damages sustained by said petitioners to their said lands, and to fix the amount of compensation to be paid to them, the said James K. Pumpelly and Edwin C. Gray for the said damages so by them sustained.

447

And whereas, at the time and place appointed for the hearing of the said application and petition, the said James K. Pumpelly and Edwin C. Gray did appear before the said court, by Gillet and Hammond, their attorn·ys, and the said United States did also appear by the Hon. Chas. R. Gill as attorney for the United States, and for the Department of Justice of the United States;

And whereas, the said court did, after hearing the said parties, by their said attorneys, by an order of the said court on the same day duly made appoint the undersigned George F. Wheeler, Robert H. Hotchkiss and Aaron Walters, as such commissioners, and fix by said order as the time and place for the first meeting of said commissioners the 1st day of June, A. D. 1875, at the Patty House, in the city of Fond du Lac, at 1 o'clock p. m. of that day; and whereas, the undersigned did, at the time and place fixed as aforesaid for their first meeting, meet pursuant to said order and did then and there take and subscribe the oath prescribed by the 28th section of the fourth article of the constitution of the State of Wisconsin before entering upon our duties as such commissioners, and did then adjourn the proceedings before us until the 2nd day of June, 1875, at the same place, and did meet at the time and place appointed and adjourn until the 12th day of July, A. D. 1875, at 7 o'clock p. m. of that day to meet at the same place.

448

And whereas we, the said commissioners, did meet pursuant to said adjournments at the said time and place and did then and there enter upon our said duties as such commissioners;

And whereas, the said parties were duly notified by us of said several adjournments, and did appear before us by their said attorneys and

did, at the day and place last aforesaid, proceed to offer and make their proofs and allegations and did, from time to time, continue to offer and give such proofs and allegations before us until the 6th day of August, A. D. 1875, both of said parties being at all times represented before us by their said attorneys and on that day the said proofs and allegations of the respective parties having been fully completed and submitted to us;

And whereas we did, on the 7th day of August, A. D. 1875, view the premises aforesaid;

And whereas we have duly considered the said proofs and allegations of the said parties and have made personal view of the said premises:

449 We do hereby award and determine that there shall be paid to the said James K. Pumpelly and Edwin C. Gray, as compensation for the damages sustained by them by reason of the flowing and injuries to the lands described in their said petition, by means of the said dam across the north channel of the outlet of Lake Winnebago, maintained by the United States, the sum of "eight thousand dollars." All of which is respectfully submitted.

Dated August 10th, 1875.

GEO. F. WHEELER,
ROBERT H. HOTCHKISS,
AARON WALTERS.

Filed Aug. 18, 1875.

M. M. KENNA, *Clerk.*

450 We, the undersigned, commissioners to hear and determine the matters submitted to us by the order of the circuit court of Fond du Lac County, dated the 4th day of May, A. D. 1875, do hereby certify that we have actually expended each twenty-eight days' time in the hearing, examining, and determining the matters so submitted to us by said order.

Dated August 10th, 1875.

GEORGE F. WHEELER.
ROBERT H. HOTCHKISS,
AARON WALTERS.

(Endorsements:) James K. Pumpelly, Edwin C. Gray vs. United States. Award & report. Filed Aug. 18, 1875. M. M. Kenna, clerk.

451 In the matter of the application of James K. Pumpelly & others, for the appointment of commissioners.

To CHARLES R. GILL, Esq.,
Ass't Attorney-General of the United States, representing the United States in the above-entitled matter:

SIR: Please to take notice that we, the undersigned commissioners of appraisal in the above-entitled matter, will meet to consider the amount of compensation to which the petitioners and claimants of damages are and each of them is entitled in this matter, at the "Patty House," in the city & county of Fond du Lac, State of Wisconsin, on the 12th day of July, A. D. 1875, at the hour of seven o'clock p. m., and that we hereby notify you to be present then & there.

Dated Fond du Lac, June 1st, 1875.

Yours, respectfully,

GEO. F. WHEELER,
ROBT. HOTCHKISS,
AARON WALTERS,
Commissioners, &c.

(Indorsed:) In the matter of the application of J. K. Pumpelly et al. for the appointment of commissioners. Notice of the meeting of the commissioners.

Due service of the within notice admitted this 1st day of June, 1875.

CHAS. R. GILL,
Att'y for the United States.

452 In the matter of the application of James K. Pumpelly et al. for the appointment of commissioners.

STATE OF WISCONSIN,
Fond du Lac County, ss:

We, Robert H. Hotchkiss, George F. Wheeler, and Aaron Walters, being duly sworn, do, and each for himself does, solemnly swear that he will support the Constitution of the United States, and the constitution of the State of Wisconsin, and faithfully discharge the duties of our office as commissioners of appraisal of the lands and injuries mentioned in the petition of Frank L. Jones, administrator of the estate of George J. Pumpelly, dec'd, James K. Pumpelly, and Edwin C. Gray, and Herman C. Geisse, heretofore filed with the clerk of the circuit court of said county, to the best of our ability. So help us God.

ROBERT H. HOTCHKISS. [L. S.]
GEO. F. WHEELER. [L. S.]
AARON WALTERS. [L. S.]

Sworn and subscribed to before me this 1st day of June, A. D. 1875.

D. W. McKENNA,
Deputy Clerk of Circuit Court, Fond du Lac, Wisconsin.

In the matter of James K. Pumpelly et al. for the appointment of commissioners. Filed June 1st, 1875. M. M. Kenna, clerk.

453 In the matter of the appointment of three commissioners for the appraisal of certain lands, pursuant to the application of said petitions hereto annexed, after hearing J. M. Gillet, of counsel for the said petitioners, respectively, and Chas. R. Gill, esq., on behalf of the United States, and upon consideration of the matters set forth in said petition, I do hereby nominate and appoint George F. Wheeler, of Dodge County, Robert Hotchkiss, of Sheboygan County, and Aaron Walters, of Fond du Lac County, as such commissioners, to do and perform the several duties of commissioners, pursuant to law; and I do hereby fix the time of the first meeting of such commissioners on the 1st day of June, A. D. 1875, 1 o'clock p. m. of that day, and the place of such meeting at the Patty House, in the city of Fond du Lac.

And I do hereby fix the compensation of said commissioners at ten dollars per day each, for such time as may be actually spent in the performance of their said duties.

Dated May 4, 1875.

CAMPBELL McLEAN,
Judge 4th Judicial Circuit, Wisconsin.

(Endorsed:) Filed May 8, 1875. M. M. Kenna, clerk.

454 To the Hon. CAMPBELL MCLEAN,
Judge of the 4th Judicial Circuit of Wisconsin:

The undersigned respectfully petition and pray your honor for the appointment of three commissioners of appraisal, pursuant to chapter 119 of the general laws of 1872, and the amendments thereto, for the appraisal of the following-described lands, and the damages thereto, occasioned by means of the dam now owned by the United States across the north channel of the outlet of Lake Winnebago, in the county of Winnebago, in said State:

Your petitioners respectfully represent that they are respectively owners and occupants of the several pieces of land hereinafter described, and have so been for many years last past, and that the said dam causes great injury thereto, by flowing and soaking the same, by the waters of Lake Winnebago, which set back upon said lands, and flow and soak the same, and are made so to do by the said dam, for which injuries compensation has not been made.

And your petitioners respectfully show that the said dam has heretofore been maintained by the Fox & Wisconsin Improvement Company, grantees of the State of Wisconsin, and by the
455 Green Bay & Mississippi Canal Company, both being corporations under the laws of the State of Wisconsin, organized for the purpose of the improvement of the Fox & Wisconsin rivers, and that the United States has succeeded to the title and possession of such improvements, and its works and dams, of which the dam hereinbefore mentioned is one; that by an act of the legislature of said State, approved March 12, 1874, the Government of the United States was authorized to condemn real estate and property necessary to be taken for the purposes of such improvement, and that by an act of Congress of the United States, approved March 3, 1875, it was, amongst other things, enacted that in case of the flowage or injury of any lands or other property by means of any part of the works of said improvements heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation might be ascertained in the mode provided by the laws of the State in which such property lies; that said dam cannot be maintained without continuance of such injuries to said lands, and that by said act of Congress, and also by an act of Congress of June 23, 1874, appropriation was made to the amount of eight hundred thousand dollars for the carrying on and completion of said
456 improvements, of which sum fifty thousand dollars was authorized to be appropriated for the payment of damages for property taken and damaged by reason of the construction and maintainance of said works of improvement; to all which several acts your petitioners beg leave to refer and make the same a part of this petition.

The following is a description of the lands, with the names of the owners, occupants, and parties in interest, respectively, entitled to the compensation for injuries thereto, & for the taking thereof, all being situated in the county of Fond du Lac, and State of Wisconsin, to wit:

Section 1, town. 15, range 17, excepting the south half of the southwest quarter of the southwest quarter of said section; also excepting three acres in the northeast part thereof sold to Hiram White; and also excepting about three acres near the west side, and along the gravel road, sold to Fountain & Dunn; there being in said section, after deducting said exceptions, five hundred and sixty-five acres.

The claimants for the taking of & injuries to said lands, are Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, James K. Pumpelly, & Edwin C. Gray.

Lots number 2 & 3, of section 19, in township No. 16 north, of range 18 east (except the south twelve acres), containing two hundred acres.

457 The owner and claimant for damages is Hiram C. Geisse.

Lots number 2, 3, 4, 5, 6, 7, 8, 9, 10, & 11 in block No. 3.
Lots No. 1, 2, 3, 4, 5, 6, 7, 8, in block No. 4.
Lots " 1, 2, 3, 4, 5, in block No. 5.
Lots " 2, 3, 4, 5, 6, 7, 8, in block No. 12.
Lots " 1, 4, 5, 6, in block No. 15.
Lots " 1, 6, 7, in block No. 29.
Lots " 3, 4, 5, 9, 10, 11, in block No. 30.
Lots " 2 & 6, in block No. 31—

All in the village of Taycheedah, in the county of Fond du Lac, according to the recorded plat thereof, and being a part of the southwest quarter of section 31, in town. No. 16 north, of range No. 18 east.

The claimant for damages is Herman C. Geisse, surviving executor of the last will & testament of F. William Geisse, deceased, and heir at law of said William Geisse.

GILLET & HAMMOND,
Atty's for Petitioners.

STATE OF WISCONSIN,
Fond du Lac County, ss:

J. M. Gillet, being duly sworn, doth depose and say that he is one of the attorneys for the above-named petitioners & a member of the firm of Gillet & Hammond; that he has read the foregoing petition
458 and knows the contents thereof, and that he is acquainted with the facts set forth in said petition & verily believes the same to be true, & further saith not.

J. M. GILLET.

Sworn & subscribed before me Ap'l 20, 1875.
GEO. E. SUTHERLAND,
Notary Public, Wis.

(Indorsed:) In the matter of application of James K. Pumpelly et al. for appointment of commissioners. Petition to file. Gillet & Hammond, att'ys for petitioners. Filed Feb. 9, 1878. L. F. Kellogg, clerk sup. ct. Wis. Filed April 21, 1875. M. M. Kenna, clerk.

459 Circuit court, Fond du Lac County.

J. K. PUMPELLY ET AL.
vs.
UNITED STATES.

FOND DU LAC COUNTY, *ss:*

I, James Russell, clerk of the circuit court in and for said county, do hereby certify that the annexed and foregoing are the original and all the papers and pleadings which have been filed in my office in the above-entitled cause, and the same are hereby transmitted to the clerk of the supreme court at Madison, pursuant to the annexed appeal and undertaking, and the direction of the attorney for the defendant.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court this 7th day of Febr'y, A. D. 1878.
[SEAL.] JAMES RUSSELL, *Clerk.*

460 And afterwards, to wit, on the 1st day of May, A. D. 1878, the said United States of America, by Charles Devens, Attorney-General, U. S. A., by R. L. D. Potter, special assistant, filed its certain notice of argument, in the words and figures following, that is to say:

State of Wisconsin, in supreme court.

FRANK L. JONES, ADMINISTRATOR OF THE estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, plaintiffs & respondents,
against
THE UNITED STATES OF AMERICA, DEFENDANT & appellant.

Please to take notice that this cause will be brought on for argument before this court, at the next general term thereof, to be held at the capitol building, in the city of Madison, in the State of Wisconsin, on the second Tuesday in August, A. D. 1878, at the opening of court on that day, or as soon thereafter as counsel can be heard.
Dated April 24, 1878.
Yours, etc.

CHARLES DEVENS,
Attorney-General, U. S. A.
By R. L. D. POTTER,
Special Assistant.

To GILLET and HAMMOND,
Attorneys for Pl'ffs & Respondents.

461 (Endorsements:) State of Wisconsin. In supreme court. Frank L. Jones, administrator of the estate of George J. Pumpelly, deceased, et al., respondents, against The United States of America, appellant. Notice of argument.
Due service of the within notice of argument by copy is hereby admitted this 25th day of April, A. D. 1878.

GILLET AND HAMMOND,
Att'ys for Respondents.

Filed May 1, 1878. L. F. Kellogg, cl'k sup. c't Wis.

And afterwards, to wit, at the August term, A. D. 1878, of said court, on the thirty-ninth day of the term, to wit, on the twenty-ninth day of November, A. D. 1878, the following proceedings were had, that is to say:

FRANK L. JONES, ADM'R, &C., ET AL., RESPONDENTS, *vs.* THE UNITED STATES OF AMERICA, APPELLANT. } Fond du Lac circuit court.

And now at this day came the said appellant, by its attorneys, and moved the court now here for an order to show cause why an affidavit

showing service of the notice of appeal, &c., should not be filed in this cause, and the court being now fully advised of and concerning the same, it is ordered that the said motion be and the same is hereby allowed.

462 And afterwards, to wit, on the forty-third day of said term, to wit, on the third day of December, A. D. 1878, the following further proceedings were had, that is to say:

FRANK L. JONES, ADM'R., &C., ET AL., respondents, *vs.* THE UNITED STATES OF AMERICA, appellant.	Fond du Lac circuit court.

On reading and filing the stipulation of the parties herein by their attorneys, and on motion of the said appellant, it is ordered that an affidavit showing the service of the notice of appeal, &c., be allowed to be, and the same is hereby, filed in this cause.

Upon the entry of which said order the affidavit showing service of the notice of appeal, together with the said stipulation, was filed in the words and figures following:

State of Wisconsin in supreme court.

FRANK L. JONES, ADMINISTRATOR OF THE ESTATE of George J. Pumpelly, deceased, James K. Pumpelly and Edwin C. Gray, plaintiffs and respondents,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT and appellant.

463 Appeal from the circuit court of Fond du Lac County.

STATE OF WISCONSIN,
County of Dane, ss:

R. L. D. POTTER, being duly sworn, upon his oath says, that at the time of taking the appeal in this case he was the attorney for the defendant. Deponent further upon his oath says, that on the 6th day of February, A. D. 1878, he served the notice of appeal to the supreme court of said State, and the undertaking required by law to perfect such appeal, which notice of appeal and undertaking are now on file in this court with the papers in this case, sent to this court by the clerk of said circuit court on such appeal, upon Gillet & Hammond, attorneys for said plaintiffs in said cause, by leaving true and compared copies of said notice of appeal and undertaking, and the whole thereof in the law office of J. M. Gillet, then late member of the firm of said Gillet & Hammond, and successor of said firm, at Fond du Lac, Wisconsin, on the said 6th day of February, A. D. 1878, with, and in the presence of one Mr. Gillet, in said law office, who was then and there informed by him, this deponent, of the contents of said notice of appeal and undertaking, he, the said Mr. Gillet, having then and there the charge of said law office, he, the said J. M. Gillet, being absent from his said law office at the time of such service, and that on the same day he, this deponent,

served said notice of appeal and undertaking upon James Russell, esq., clerk of the circuit court of said county of Fond du Lac, by serving like copies upon him and leaving the same with him at his office in Fond du Lac aforesaid, and by then and there delivering to and leaving with said clerk the original notice of appeal and undertaking. Deponent further says that on the 8th day of February, A. D. 1878, he made and subscribed an affidavit setting forth in substance all the foregoing facts proving such service of said notice of appeal and undertaking upon said clerk and said attorneys of said plaintiff, and that he, this deponent, intended to file the said proof of such service with the clerk of said circuit court, to be transmitted by him with the papers in said cause to this court; that by accident and without intent upon the part of deponent said last mentioned affidavit was lost or destroyed; that deponent has made diligent search in all places where he supposed the same might be for the said affidavit, and cannot after such search find the same. Deponent further says, that said judgment from which such appeal was taken was entered and rendered on the 13th day of December, A. D. 1876, and such appeal was taken long before the expiration of two years after the rendition and entry of said judgment. 464

R. L. D. POTTER.

Subscribed & sworn to before me this 27th day of November, A. D. 1878.

W. HELM,
Notary Public, Dane Co., Wis.

(Endorsement:) I hereby acknowledge service of the within affidavit and order to show cause upon me by copy this 29th day of November, A. D. 1878, at Fond du Lac, Wis., respondent's attorney. 465

State of Wisconsin, in supreme court, *ss:*

FRANK L. JONES, ADMINISTRATOR OF THE estate of Geo. J. Pumpelly, et al., respondents and pl'ffs,
agst.
THE UNITED STATES OF AMERICA, APPELLANT.

Upon the annexed affidavit of R. L. D. Potter, on motion of O. B. Thomas, attorney for appellant, it is ordered that the attorneys of respondents show cause before this court at the court-room of the supreme court in the capitol at Madison, Wisconsin, on Tuesday, the 3d day of December, 1878, at 10 o'clock a. m. of said day, or as soon thereafter as counsel can be heard, why proof of the service of the notice of appeal and undertaking in this cause shall not be made before this court and filed herein by filing the affidavit hereto attached in said court, or for such other or further order as may be just and proper.

Done in open court at Madison aforesaid this 29th day of November, 1878.

By the court.

CLARENCE KELLOGG,
Clerk Sup. Court Wis.

It is hereby consented that the above order may be entered 466

and that the proof of service of the appeal papers in this action may be filed herein.

Nov. 29, 1878.

GILLET AND HAMMOND.
J. M. GILLET.

Filed Dec. 3, 1878. Clarence Kellogg, cl'k sup. c't Wis.

And afterwards, to wit, on the twentieth day of December, A. D. 1878, on the fifty-second day of the term, the following further proceedings were had, that is to say:

FRANK L. JONES, ADM'R. &C., ET AL., respondents,
vs.
THE UNITED STATES OF AMERICA, appellant.
} Fond du Lac circuit court.

By the consent of the parties herein by their attorneys it is ordered that this cause be and the same is hereby stricken from the calendar of the present term of this court.

And afterwards, to wit, on the twenty-sixth day of December, A. D. 1878, the said United States of America by its attorney, Charles Devens, Attorney-General of the United States, by O. B. Thomas, special assistant, and R. L. D. Potter, per O. B. Thomas, filed its certain
467 notice of argument in the words and figures following, that is to say:

Supreme court, State of Wisconsin, fourth judicial circuit.

FRANK L. JONES, ADMINISTRATOR OF THE estate of George J. Pumpelly, deceased, James K. Pumelly, and Edwin C. Gray, plaintiffs and respondents,
vs.
THE UNITED STATES OF AMERICA, defendant and appellant.
} Appeal from circuit court, Fond du Lac County.

Please take notice that the appeal from the judgment of the circuit court in the above-entitled action will be brought on for argument at the next January term of the supreme court of the State of Wisconsin, to be held in the supreme court room at the capitol, in the city of Madison, on the 7th day of January, A. D. 1879, the same being the Tuesday next preceding the 2d Wednesday of January, 1879, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

Dated Dec. 20, 1878.

Yours, etc.,

CHARLES DEVENS,
Attorney-General of the United States,
By O. B. THOMAS,
Special Assistant,
And R. L. D. POTTER,
Per O. B. THOMAS,
Attorneys for Appellant.

To Messrs. GILLET & HAMMOND,
Attorneys for Respondents.

(Endorsements:) We hereby acknowledge due service of a copy of the within notice, this 23 day of December, 1878. Gillet & Hammond, attorneys for respondents. Filed Dec. 24, 1878. Clarence Kellogg, cl'k sup. c't Wis.

468 And afterwards, at the January term, A. D. 1879, on the twenty-fifth day of said term, the same being the seventh day of March, A. D. 1879, the following further proceedings were had in the words and figures following, that is to say:

FRANK L. JONES, ADM'R, &C., ET AL., respondents,
vs.
THE UNITED STATES OF AMERICA, appellant.
} Fond du Lac circuit court.

And now at this day came the said respondents by their attorney and moved the court now here to continue this cause to the next term of this court. Which motion having been argued by N. S. Gilson, esq., for the said respondents, and by O. B. Thomas, esq., for the said appellant, and submitted, and the court being now fully advised of and concerning the same, it is ordered that the said motion be and the same is hereby allowed, and that this cause be and the same is hereby continued to the next term of this court, to be placed upon the calendar without notice at the foot of the first assignment of causes.

And afterwards, to wit, at the August term, A. D. 1879, on the eighth day of the said term, the same being the nineteenth day of August, A. D. 1879, the following further proceedings were had in
469 said cause in the words and figures following, that is to say:

FRANK L. JONES, ADM'R, &C., ET AL., respondents,
vs.
THE UNITED STATES OF AMERICA, appellant.
} Fond du Lac circuit court.

And now at this day came the said respondents, by their attorney, and moved the court now here to dismiss the appeal in this cause, and the court not being now sufficiently advised of and concerning the same, took time to consider of its opinion.

FRANK L. JONES, ADM'R, &C., ET AL., respondents,
vs.
THE UNITED STATES OF AMERICA, appellant.
} Fond du Lac circuit court.

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been commenced by O. B. Thomas, esq., for the said appellant, and by Messrs. N. S. Gilson and Geo. E. Sutherland for the said respondents, and there not being now sufficient time to complete the same, it is continued for further arguments.

470 And afterwards, to wit, on the ninth day of the said tern

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the same being the twentieth day of August, A. D. 1879, the following further proceedings were had in said court in this cause, to wit:

FRANK L. JONES, ADM'R, &C., ET AL., respondents, *vs.* THE UNITED STATES OF AMERICA, appellant. } Fond du Lac circuit court.

And now at this day came the parties herein, by their attorneys, and the argument of this cause having been resumed and completed, and the court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

And afterwards, to wit, at the January term of said court, on the second day of the term, to wit, on the third day of February, A. D. 1880, the following further proceedings were had in said court in this cause, to wit:

FRANK L. JONES, ADMINISTRATOR OF THE estate of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, respondents, *vs.* THE UNITED STATES OF AMERICA, appellant, } Fond du Lac circuit court.

Opinion by Orton, J.

471 This cause came on to be heard on appeal from the judgment of the circuit court of Fond du Lac County, and was argued by counsel. On consideration whereof it is now here ordered and adjudged by this court that the judgment of the circuit court of Fond du Lac County in this cause be, and the same is hereby, affirmed, with costs against the said appellant, taxed at the sum of one hundred and twenty-three $\frac{75}{100}$ dollars.

Justice Taylor takes no part in this cause.

Chief-Justice Ryan dissents.

Upon the rendering and entering of which said judgment the following opinion of the court was filed in said cause, in the words and figures following, that is to say:

Supreme court.

FRANK L. JONES, ADM'R OF THE ESTATE OF George J. Pumpelly (deceased), James Pumpelly, and Edwin C. Gray, respondents, *vs.* THE UNITED STATES OF AMERICA, APPELLANT.

The State of Wisconsin, in making the improvement of the Fox and Wisconsin Rivers, under the act of Congress of Aug. 8, 1846,
472 making a grant of lands for such purpose, and the act of the legislature of Wisconsin of June 29, 1848, accepting the trust, con-

structed as a part of such improvement the dam, by means of which the lands of the plaintiffs were overflowed and damaged. Any question which might otherwise have arisen, whether such flowing of and consequential damages to the lands of the plaintiffs by means of such dam constitute a taking of such lands for public use under the right of eminent domain, subject to the constitutional condition of making just compensation therefor, has been removed, by the decision of the Supreme Court of the United States in the case of Pumpelly vs. Green Bay Co., 13 Wall., 166, in which these lands and the rights of the former owner as to compensation for such flowage were considered, and it was held that such flowage was such a taking. The act of Congress of March 3, 1875, was doubtless framed in view of this decision, and in terms provided for the ascertainment of "compensation now legally owing" for lands "now flowed" by means of a part of the works "heretofore constructed."

Until this act of Congress, after the United States had become the owner of the improvement and assumed the burthen of making such just compensation, not only for lands thereafter to be taken, but also for lands which had been already taken by such flowage, there had been no provisions made by law for such compensation or for ascertaining
473 the same. As the dam was completed so as to cause the flowage and consequential damage in the year 1861, this act may well be construed to authorize the ascertainment of the past damages of the plaintiffs, as well as the future or permanent damages to the lands, and in this respect may not be strictly analogous to a future taking or condemnation of lands for the use of the improvement. It will be seen that the act provides for both cases, and as to the questions of constitutionality and jurisdiction, these provisions may well stand together, but as to the measure damages in each case, the provisions are distinctive and independent.

Such a provision allowing full compensation to the owner of lands already flowed and damaged, by works already constructed, as for lands actually taken at the time when the flowage was caused by the works for past damages within the period of limitation by the statute of the State, as well as for failure and permanent damages, would be most reasonable, and appears to be within the terms of the act, and comports with the liberal and equitable policy of the United States in taking charge of the improvement and assuming the liability of making full and just compensation to the private owner for lands taken for its use.

The first section of the act provides, "That whenever in the prosecution and maint*ai*nance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, it becomes necessary
474 or proper, in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands for canals and cut-offs, or to use any earth, quarries, or other materials lying adjacent or near to the line of said improvement, and needful for its prosecution or maint*ai*nance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered,

the amount of such compensation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and the flowage damages hereinbefore occasioned." The second section, appropriates twenty-five thousand dollars to be applied in payment for the property and rights so taken and used.

In section two of an act of the legislature of this State, approved March 12, 1874, it is provided, that "in case the lands of any
475 person have been overflowed, or injured, or taken, or if it shall be found necessary or proper hereafter to overflow, injure, or take the lands of any person, for or by reason of the construction of any dam, bridge, lock, or pier, or the repair, or the enlargement thereof, or the construction, repair, or enlargement of any canal or other works by the United States Government, in the improvement of any harbor, river, or stream of water in this State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured, or taken as aforesaid, may be ascertained, determined, and paid, in the same manner as prescribed in chapter 119 of the laws of 1872, entitled 'An act in relation to railroads and the organization of railroad companies,' approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of said act may apply in case of the overflowing, injury, or taking of lands by the United States Government for the purposes aforesaid which are properly applicable thereto."

I have emphasized the words in the above acts used in a past tense, significantly applicable to these proceedings, which were instituted and have been conducted in accordance with said acts, as far as their provisions were applicable.

It is contended by the learned counsel of the appellant that the language "in the mode," and "in like manner," as used in the act of
476 Congress, refer only, to the method, form, or manner of the proceedings themselves and does not embrace the tribunal in which they are to be instituted, and does not impart any direction or permission, that such proceedings may be taken in the courts of the State in which the lands overflowed are situated. We think such is not its meaning because: First. Such a strict construction would destroy the only purpose of the act, and make the act itself wholly unnecessary; for without it, there is no doubt of the jurisdiction of the Federal courts in such a case or of their method of proceeding. Kohl et al. vs. United States, 91 U. S. Rep., 367; second. In that case Mr. Justice Miller, in his opinion, uses the word "mode" as embracing both the proceedings to condemn lands and the tribunal in which they are to be taken, when he says, "doubtless Congress might have provided a mode of taking the land and determining the compensation to be made, which would have been exclusive of all other modes. They might have prescribed in what tribunal, or by what agents, the taking and the ascertainment of the just compensation should be accomplished. The mode might have been by a commission, or it might have been referred exclusively to the circuit court, but this we think was not necessary;" third. Congress adopted and ratified such a construction of this language
477 as gives direction or permission for these proceedings to be instituted in the courts of this State, by the subsequent act of June 20, 1878, making an appropriation "for payment of George F. Wheeler, Robert H. Hotchkiss, and Aaron Walters, for services rendered by them as commissioners appointed pursuant to an act of Congress of March 3, 1875, to appraise damages to lands in Fond du Lac County,

Wisconsin, caused by the improvement of the Fox and Wisconsin rivers."

We assume, therefore, that by the above acts of Congress and of the legislature of this State, the United States Government has authorized and directed the institution of these proceedings in the State court, and fully assented thereto, and this State has consented to the use of the State tribunals for such purpose. This brings us to the question of the constitutionality of the laws above cited, which is made the important question in this case by the learned counsel of the appellant. The condemnation of private property to the public use by the United States is the exercise of the sovereign power through such agencies as Congress may determine; and as the Supreme Court has said, in Kohn et al. vs. U. S. supra, "doubtless Congress might have provided a mode of taking the land and determining the compensation to be made which would have been exclusive of all other modes. They might have
prescribed in what tribunal or by what agents the taking and the
478 ascertainment of the just compensation, should be accomplished.
It might have been by a commission or it might have been referred exclusively to the circuit court." But after all, the condemnation is made by the government through such instrumentalities and agencies as Congress may have provided by law as the means by which and the mode in which the sovereign power to such end might be exercised. It is scarcely a delegation of the power of condemnation to designate the courts in which or the agencies by which it is exercised, although it is held that the power even may be delegated. Pratt et al. vs. Brown, 3 Wis., 603; but more properly, "the statutory process for its exercise" may be delegated. Bohlman vs. Green Bay & Minn. Ry. Co., 40 Wis., 168.

The power of eminent domain is conceded by the learned counsel to be political, and not judicial, and many authorities are cited by him in support of the principle; such as People vs. Smith, 21 N. Y., 597; Hays vs. Risher, 22 Penn. St., 169; Bankhead vs. Brown, 25 Iowa, 540, and others; and if political, of course it cannot be delegated to the courts, although Congress may be law confer upon any court or tribunal, or upon a commission, jurisdiction, and prescribe and determine the proceedings for the efficient and convenient exercise of this power by the
government. In this case the power to condemn and take the
479 lands of the respondents for the use of the improvement had already been exercised, and they have long since been actually appropriated to such use, but conditionally, upon the payment of just compensation therefor, when ascertained in the way and mode prescribed by the law of Congress above considered; and neither this State or its courts have assumed any power to condemn, but only to determine the compensation to be made for lands already taken and condemned, according to the act of Congress and the statute of this State. Whether the United States had taken the first step and asked the appointment of these commissioners, as would have been necessary to assert the power of eminent domain and condemn lands, not before taken and already appropriated, or the respondents became the moving party, and ask for the appointment of commissioners to ascertain the amount of the just compensation and assess the damages for lands already taken and appropriated, as in this case, not only the proceedings but the legal results would have been the same. The commissioners in either case take cognizance only of the question of compensation and damages as for lands taken and condemned. In the first case the proceeding would be a suit at law, brought by the United States i

form against the owner of the lands sought to be condemned. Kohl et al. vs. U. S, supra. May not such a suit be brought by the United States in a State court? Why not? The United States, like
480 any other party, may bring suit for any proper purpose in a State court. In Cotton vs. U. S., 11 How., 229, the suit was brought in the superior court of West Florida, for damages for trespass upon government lands, by the United States, and Mr. Justice Grier says of the question of jurisdiction: "Every sovereign State is of necessity a body-politic, or artificial person, and as such capable of making contracts, and holding property, both real and personal." "It would present a strange anomaly, indeed, if, having the power to make contracts and hold property, as other persons, natural or artificial, they were not entitled to the same remedies for their protection." "Although, as a sovereign, the United States may not be sued, yet, as a corporation or body-politic, they bring suits to enforce their contracts and protect their property in the State courts, or in their own tribunals administering the same laws." "As an owner of property in almost every State of the Union, they have the same right to have it protected by the local laws that other persons have." As was said by this court in Dugan vs. United States, 3 Wheat., 151, "It would be strange to deny the right which is secured to every citizen of the United States." See also The United States vs. The Bank of the Metropolis, 15 Peters, 392, and The United States vs. Gear, 3 How., 120. This proceeding, when instituted by the United States, is a suit at law, and, as Mr. Jus-
481 tice Strong says in Kohl et al., vs. U. S., supra, "It is an attempt to enforce a legal right."

There can be no question but that the United States may institute these proceedings in a State court, without any special legislative permission, and secure precisely the same legal results as were effected in this case. When the proceeding is instituted by the private owner of the property already taken for public use, as in this case, merely for the ascertainment of the compensation to be paid therefor, it may be in form, a suit against the United States, and be so entitled, but this form of the proceeding does not change its substance, and it remains, until the ascertainment of the compensation, a judicial proceeding by the United States, to enforce the right of eminent domain, by the condemnation of the property to public use.

But if it be a suit, both in form and substance, against the United States, then there is no principle better established than that the United States may by act of Congress waive its sovereignty and authorize, permit, or consent that such suit may be brought in the State court.

Without such consent, it is an axiom that no sovereignty, State or national, can be sued in any court, in its own or foreign courts. In United States vs. Clarke, 8 Peters, 444, Chief-Justice Marshall says:
"As the United States are not suable of common right, the
482 party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it." In that case the suit was by petition against the United States, praying that the court would decree confirmation of the title of the petitioner to certain lands claimed to have been granted to him by the governor of the province of Florida, and the court held that jurisdiction of the superior court of Florida in such case had been conferred by the consent of the United States by act of Congress. In Reeside vs. Walker, 11 How. U. S., 290, Mr. Justice Woodbury says: "It is well settled, too, that no action of any kind can be sustained

against the government itself for any supposed debt, unless by its consent under some special statute allowing it, which is not pretended to exist." In the late case of Carr vs. The United States (unreported), 11 Leg. News, 215, Mr. Justice Bradley says: "We consider it to be a fundamental principle that the government cannot be sued except by its own consent." See also 1 Kent Com., 297; 2 Story Const., § 1699.

It is significant that numerous statutes of the United States from 1789 until the present have been passed authorizing suits to be brought against the United States in the State courts, and for various purposes, and such authority has not been questioned. It is needless to
483 discuss questions not in this case, and to review authorities cited by the learned counsel, where the United States were a party to litigation in State courts, and no such jurisdiction was conferred by act of Congress expressing consent.

We have been cited to no case, and we think none can be found in which it has been held that such jurisdiction may not be conferred by such legislative assent, or that such an act of Congress was unconstitutional.

We shall be brief in disposing of the other questions raised upon this appeal.

First. The title of the plaintiff appears to have been sufficiently proved.

Second. The condition, found in the act of Congress above referred to, "and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner," imposes upon the officer of the United States an active, not a passive duty, which is not performed by the mere expression of an opinion, but which requires such final and conclusive action of the Government of the United States by such officer as would be a legal release and relinquishment of all present and future right to maintain the dam. Any other construction would allow the mere opinion of the officer, on the question of prudence, which might or might not result in a relinquishment of the right to maintain the dam for the use of the improvement to be a perpetual obstruction to
484 the plaintiff's right to the damages or compensation that he might thereafter suffer and be otherwise clearly entitled to have ascertained. We think the intention of this condition clearly was that, in the proceedings to ascertain the damages by flowage caused by such dam, if it should appear that the United States had relinquished its right to longer maintain the dam, then future and permanent damages should not be assessed, but that such relinquishment would not, in any way, affect the plaintiff's right to damages already suffered. The evidence not only showed that no such relinquishment had been made, but that it probably would not be made in the future, and therefore such mere opinion constituted no defence to the plaintiff's claim for permanent damages. The construction of this condition, claimed by the learned counsel of the appellant, would most clearly make it repugnant to the constitutional right of the plaintiffs to obtain compensation, and to the act of Congress providing for its enforcement and it would be utterly void.

Third. The fact that another dam besides the one in question might, to some extent, contribute to produce the flowage raises a question, which has already been decided by this court and by the Supreme Court of the United States adversely to the position taken by the counsel of the appellant. Arimand *vs.* Green Bay Co., 35 Wis., 41; and Pumpelly *vs.* Green Bay Co., 16 Wall., 166.

485 Fourth. The rule of damages, submitted by the court to the

jury, appears to be more favorable to the United States than the rule contended for by the learned counsel of the appellant, and seems to have been substantially, in compliance with the construction of the act of Congress which we have already given to it, as allowing the assessment of all the past damages which were caused by the construction of the dam within the period of statutory limitation. This liberal rule of construction of the act of Congress was the one adopted by the Hon. Edward Pierrepont, then Attorney-General of the United States, in his opinion under date of November 10, 1875, to Gen. Gill, the special attorney of the government, after the commencement of these proceedings. He says, "On this point I think it may well be conceded that, if at the period of the transfer, (the transfer of the improvement to the U. S.), there were any lands flowed by means of the works of said improvement, for which the land owners were then legally entitled to claim compensation, as for property taken or appropriated for public purposes, and the United States thenceforth maintained the flowage of the lands in the same manner and to the same extent, thus, as it were, adopting the original taking or appropriation thereof, the obligation to pay such compensation devolved upon the United States, not by virtue of
486 any agreement or understanding with said company, but by mere operation of law." This rule of damages was substantially adopted, in all probability, by the commissioners making the assessment, as well as by the circuit court on appeal.

The judgment of the circuit court is affirmed with costs.

487 State of Wisconsin, supreme court, ss:

FRANK L. JONES, ADMINISTRATOR OF THE ESTATE of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray, respondents,

vs.

THE UNITED STATES OF AMERICA, APPELLANT.

I, Clarence Kellogg, clerk of the supreme court of the State of Wisconsin, do hereby certify that the above and foregoing is a true and correct transcript of all the record and proceedings now on file and of record in my office, with all things concerning the same in the above-entitled cause.

That the original writ of error and the citation with its service endorsed thereon are appended to the return herein, and that they are all returned to the Supreme Court of the United States in obedience to the command of the writ of error hereto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Madison, the twelfth day of August, A. D. 1880.

[SEAL.] CLARENCE KELLOGG,
Clerk of the Supreme Court of Wisconsin.

(Indorsement on cover:) No. 543. The United States, plaintiff in error, vs. Frank L. Jones, administrator of George J. Pumpelly, deceased, James K. Pumpelly, and Edwin C. Gray. Wisconsin supreme court. Filed 21st August, 1880.

Supreme Court
Of the United States.

October Term, 1883, No. 38.

THE UNITED STATES,
Plaintiff in Error,
vs.
FRANK L. JONES, *Anministrator of the Estate of* GEORGE J. PUMPELLY, *Deceased;*
JAMES K. PUMPELLY, *and*
EDWIN C. GRAY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF COUNSEL FOR GREEN BAY AND MISSISSIPPI CANAL COMPANY IN BEHALF OF DEFENDANTS IN ERROR.

STATEMENT OF FACTS.

This case comes up on writ of error to the Supreme Court of the State of Wisconsin. The facts in the case are substantially as follows:

By act of congress, approved August 8, 1846, congress

granted to the State of Wisconsin on its admission into the union, lands in aid of improving the navigation of the Fox and Wisconsin rivers; which rivers, with a carrying place between the same of about a mile in length are of the navigable waters leading into the Mississippi and the St. Lawrence, and the carrying places between the same, which by the ordinance of 1787, the enabling act for the admission of Wisconsin into the union, approved August 6, 1846, and the constitution of the State of Wisconsin (Cons., Art. IX, Sec. 1), are declared to be "common highways and forever free," &c. The state accepted the grant of lands, and by act of the legislature, approved August 8, 1848, created a "State Board of Public Works," and authorized the construction of the "Works of Improvement." By the fifteenth section of the act, the board was authorized to enter upon and take lands for the purposes of the improvement, by sections 17, 18 and 19, to have the compensation for lands so taken determined, and by the twentieth section it was provided that the title should vest in the state whenever an award should be made, executed and acknowledged in the manner designated. Under this act, the state undertook the construction of the works of improvement. The means, however, proved to be inadequate. The state became involved thereby, and by act of the legislature, approved July 6, 1853, chartered the Fox and Wisconsin Improvement Company, and turned over to that company the works of improvement, including the locks, dams, canals, etc., as fully as the state had right and title to the same, requiring the said company to complete the said works according to the plan theretofore adopted by the Board of Public Works, giving to such company the right to collect tolls thereon, and, by extinguishing the state debt, to acquire the lands previously granted by congress in aid of the work. By acts of congress, approved August 3, 1854, and March

3, 1855, congress made to the state for the same purpose additional or enlarged grants of lands. Thereupon the Improvement company submitted to the state a modified plan of improvement, known as "Jenny's plan," and which, by act of the legislature, approved October 3, 1856, was adopted by the state, and the company was required to complete the work in accordance therewith. By the same act the state transferred to the company the additional and all of the lands granted by congress in aid of the work, requiring the company to transfer the same, together with the works of improvement, locks, dams, canals, etc., to trustees, to be by them held, and the said lands sold and the proceeds to be applied to the payment of the unpaid state indebtedness growing out of the said improvement and to the construction and completion of the work. The deed of trust so given was foreclosed for non-performance, and the purchasers thereof, in 1866, under the laws of Wisconsin, organized themselves as a company by the name of the Green Bay and Mississippi Canal Co. Pursuant to act of congress, approved July 7th, 1870, the United States entered into an arbitration with the Green Bay and Mississippi Canal Company, whereby the value of the works of improvement in question, including its locks, dams, canals, etc., was ascertained, and in 1872, after appropriation made therefor, a deed of transfer of the same was made by the Canal Co. to the United States. Ever since the said transfer, the United States has been the owner of and in possession of the said works of improvement, and congress has made for much of the time annual appropriations for carrying on the work of constructing and completing the improvement.

The controversy in this suit grows out of damages occasioned by flowage resulting from the construction of a dam at Menasha, being one of the dams and an integral

part of the works of improvement. The level above the dam connected by a lock with the canal below gives a navigable water-way around the rapids. The dam is located on the north channel of the outlet of Lake Winnebago, which lake, about thirty miles long and ten miles wide, is an enlargement of the Fox River, at the foot of which, just below the outlet, are what were formerly known as Winnebago Rapids. The construction of the dam in question was first undertaken pursuant to an act of the legislature of the territory of Wisconsin, approved March 10th, 1848, granting to Read and Doty the right to erect a dam on the north channel aforesaid. A similar act authorized Jones and associates to build another dam on the south channel. By means of the two dams, when finally constructed, the waters of Lake Winnebago were raised so as to injure and to some extent, it is claimed, overflow the shores of the lake. Read and Doty had undertaken the construction of this dam when the board of public works act was passed and the state undertook the improvement of the Fox and Wisconsin rivers. A contest for the location of the improvement between Read and Doty, interested in the north channel, and others, interested in the south channel, resulted in an agreement between the Board of Public Works and Read and Doty to locate the improvement on the north channel and to adopt as an integral part of the works of improvement the dam theretofore undertaken by them, they, the said Read and Doty, paying a bonus therefor. The record shows that the dam was completed and raised to its present height in 1849. The coaming of the dam was put on in 1852. (Record, folios 349 and 350.) No changes in the dam other than repairs, it is claimed, have been made by the companies succeeding the state or by the United States. At the time the dam was being constructed the whole

margin of the lake which became injured by flowage was a wilderness, much of it still belonging to the United States. It was remote from large settlements, and the water route to be constructed by the improvement was then the popular method for creating a communication with the outside world.

Since the construction of the dam a portion of the improvement has been completed, railways constructed, the country settled and improved, and the lands injured by flowage have so increased in value that the damages appear now to be much greater than when first occasioned. During the time of construction few or no claims for flowage damages were made, the state, and afterwards the companies succeeding, contending for the right to raise the water by dams to such height as should be necessary for navigation, and that the damages to individuals resulting therefrom were *damnum absque injuria*. This view of the law had been declared by the state courts and by the Circuit Court of the United States for the District of Wisconsin in the case of Pumpelly vs. the Canal Co., and continued to be generally accepted until quite recently, when the said suit was brought to this Court on writ of error and reversed. (Reported in 13 Wall. p. 166.) After the decision in question, a number of other suits were brought against the Canal Company; and still later, after the transfer by the Canal Company, a large number were brought against the United States.

The arbitrators selected by the United States and the Canal Company, pursuant to the act of congress of July 7, 1870, in making their award, proceeded upon the principle that the United States should pay for the works of improvement what it had cost the state and the companies succeeding to construct them, less a reasonable abatement for wear and decay, and less also the amount realized from

the sale of lands granted by congress. No account was made of any liability of the company for flowage damages, for the reason that the decisions of the state courts and of the Circuit Court of the United States theretofore rendered were adverse to the existence of any such liability. The question, whether or not the award as made devolved upon the United States the payment of the damages for which the Canal Company was in the first instance liable, was submitted by the committee of commerce of the House of Representatives to the Sec'y of War, and by the Secretary submitted to his solicitor, Assistant Judge Advocate General Dunn, whose opinion, found in the Record, fols. 406 to 413, holds, that whatever damages had been incurred by the Canal Company would follow the property transferred and become a liability against the United States. Upon this opinion the Secretary of War caused to be prepared a bill for the assumption by the United States of the Company's liability for these damages, which afterwards became a law by act, approved March 3d, 1875. This is the act under which the proceedings resulting in the present suit were commenced. Shortly previous to this the owners of property flowed by the several dams of the improvement applied to the legislature for a means of determining the damages for which the United States were liable, and procured the passage of Chap. 291, Laws of 1874. No proceedings were taken under this act, so far as we are advised; certainly none until after the passage of the act of congress of March 3d, 1875. (See appendix.) The latter act prescribes a practice under which the United States may acquire any additional lands necessary for the improvement, and under which the compensation for lands already taken may be ascertained. In prescribing that the mode of procedure shall be according to the laws of the state, it refers to, and thereby, as we suppose, incorporates into itself the

acts of the legislature prescribing the mode, to wit:-Chap. 291 of the Laws of 1874, which refers to the railroad act (see appendix), and Chap. 119 of the Laws of 1872, which is the railroad act (for synopsis see appendix). By these acts so incorporated into the act of congress the initiative is given to the party who exercises the right of eminent domain. The only exception is where the condemning party has siezed, with the consent of the injured party (expressed or implied), and re uses or neglects to make compensation. In such case he is held to waive his right to the initiative in favor of the injured party. Appeals from the awards made, to the circuit court of the county, are allowed to either party, and in case of such appeals by either party, it is expressly provided that the appeal be entered as a suit in which the land owner shall be plaintiff and the railroad company, or the party exercising the right of eminent domain, shall be defendant.

Intending to proceed under this act of congress in the mode prescribed by the statutes of the state referred to therein, the defendants in error, who are the legal representatives of the plaintiff in the case of *Pumpelly* vs. *The Canal Company*, petitioned the Judge of the Circuit Court of the county in which the lands affected by this suit lie, to appoint commissioners to ascertain the compensation to be paid by the United States for the lands which this court, in the case reported in 13 Wall. 166, had adjudged to have been taken in the exercise of the right of eminent domain. Notice of these proceedings was given to the department of justice, which the act of congress of 1875 provided should represent the United States in proceedings thereunder. Counsel, detailed by that department, appeared before the Circuit Judge upon the hearing of that petition, and assented to his appointment of commissioners, later appeared before the commissioners, cross-examined the

witnesses of the claimant, produced witnesses on the part of the United States, and when the award was finally made, appealed therefrom to the Circuit Court of the county of Fond du Lac, according to the provisions of Chap. 119 of the Laws of 1872. When this appeal was called for trial in said court, but before the jury was impaneled, the United States, for the first time, objected to the proceedings, on the ground that the court had no jurisdiction over the person of the United States, nor jurisdiction to try a case in which the United States was a party, and that the act of congress of March 3, 1875, was unconstitutional, in that it assumed to confer upon the state courts authority to try cases to which the United States was a party. These objections were overruled, and the case proceeded to trial without any other or further objection to the jurisdiction of the court or the validity of the act of congress or the state laws. (Record, p. 5.) Upon the trial of the appeal the petitioners recovered judgment against the United States, and from the judgment of the Circuit Court the United States appealed to the Supreme Court of the state, upon which latter appeal the judgment of the Circuit Court was affirmed. (48 Wis. 385.) Throughout the whole proceeding and appeal the defendants in error and the courts of the state have, as is believed, intended to proceed under and in exact compliance with the provisions of the act of congress of March 3d, 1875. The United States has sued out a writ of error to reverse this judgment.

QUESTIONS.

I.

The first question for the court to consider is, whether it has jurisdiction of this suit. We think the record does not present a federal question for the court to decide. As we have heretofore said, the theory of the defendants in error has been that it was the intention of the act of congress, to provide a proceeding for the ascertainment of the amount of compensation to be made for lands already taken by the state or the companies succeeding and by the canal company transferred to the United States, and that the intention has been to proceed in exact accordance with the act of congress, and so far as we are advised no objections have been made by counsel for the United States to the regularity of the proceedings. On the contrary, the only contest touching the right to maintain this proceeding and the validity of the acts recited in the petition, from the time such contest was started on the trial of the appeal, at the circuit (for up to that time there had been no contest, and each party was willing to proceed under and according to the act) has been the claim on the part of the petitioners that the act of congress *was* constitutional and on the part of the United States that it *was not* constitutional. (Record, pp. 5 and 6.)

The Circuit Judge in appointing commissioners, the Circuit Court in hearing the appeal from the award of the commissioners, and the Supreme Court in determining the appeal from the Circuit Court, have each, as we understand it, treated the act in question as a remedial statute and given it a liberal construction. The only attack made upon the statute has been made by the counsel for the United States. These courts in considering the act of congress have treat-

ed it as reciting in itself the acts of the state legislature, (Chap. 119 of the Laws of 1872, and Chap. 291 of the Laws of 1874), so far as they furnish a mode of procedure for the assessment of compensation for lands already taken, and have endeavored to give the words "mode" and "manner" used in such acts, the full significance given by this court to like words in *Kohl* vs. *United States*, 91 U. S. 367, holding that they cover both the tribunal in which proceedings were to be held and the mode of procedure itself, and this, not because of any validity derived from the power of the state legislature, but because they were recited and referred to in the act of congress as furnishing the practice to be pursued under that act. The holding of this act valid in its entire scope and meaning by the Supreme Court of the state, certainly does not create a federal question under the act giving this court jurisdiction in error to the judgments of the Supreme Court of the state.

Upon the hearing in the Supreme Court of the state, the United States, for the first time, contended in argument that Chap. 291 of the Laws of 1874 was in violation of the last clause of the fifth article of amendments to the Constitution of the United States, "nor shall private property be taken for public use without just compensation," and that the decision of the Supreme Court of the state, awarding to the defendants in error and to the United States (because both parties agreed in the appointment of the commission) the benefit of section 2 of said chapter 291 of the Laws of 1874, which extended the practice for ascertaining compensation for lands taken for the use of railroad companies to the ascertaining of compensation to be paid for lands overflowed, injured or taken for the construction of dams, bridges, locks, etc., for any canal or other works for the United States, was a violation of the clause of the constitution above cited. It is

difficult to say how the enforcement of an act of congress which embodied by reference, language found in the act of a state legislature as one of its provisions, could be a decision upon the constitutionality of the law of the state. Suppose the reference in the act of congress for the procedure to be followed, instead of being to the laws of the state, had been to a standard work of practice in which such mode of procedure was laid down, and that following the course laid down, the proceeding had been instituted in the state court, would the act of congress in thus affording to and against the United States the same facilities that the course of procedure afforded to and against railroad and canal companies, have been a violation of this clause of the Constitution of the United States? The rule, as we understand it, is, that in order that a federal question shall arise, the provision of the Constitution of the United States to which the state statute or the act under the authority of the state is supposed to have been repugnant, must be clearly pointed out and the point taken in the court below, and that the repugnance of the statute or the act to the clause of the Constitution must be clear and plain.

On the hearing of the appeal in the Supreme Court of the state, counsel contended, as it appeared to us, that this act of congress and the act of the state legislature of 1874 were in violation of the clause of the Constitution above recited, because the condition relative to "just compensation" was in effect a grant of power to the United States to take private property if it did make compensation, and that the state act of 1874 undertook to grant to the United States the right to take the property of the individual upon making compensation, and *therefore*, was a violation of the grant of power which was supposed to be made by this clause of the Constitution. We do not see the argument very clearly, and may not do the counsel justice in our

statement of it, but, as we understand it, such was the claim. Conceding for the present that the power of the United States to take the property of an individual upon making compensation comes from this clause in the constitution, it is not perceived how an act of the legislature of the state which authorizes the United States to take the property of a citizen of the state, and provides a procedure therefor and for making compensation, is in derogation of the grant made by the constitution of the United States. If the statute of the state was a higher power than the constitution of the United States, the effect of the statute would simply be to confirm the power which the United States already possesses. In order that the act of the state shall be repugnant to the constitution of the United States, it must, as it seems to us, do away with the power granted by the constitution or in some manner embarrass its execution. But it is not supposed that the United States derives the power to take the property of the individual from this or any clause in the constitution. It is supposed that such power arises out of the sovereignty of the United States, and that if the constitution has any bearing upon the question, whether or not the United States has that power as a prerogative of sovereignty, it is simply a recognition of the existence of the power, by limiting the conditions of its exercise. It is also necessary in order to raise a federal question, that the Supreme Court of the state shall have passed upon the question of repugnancy of the state statute, or act under state authority, and have decided that the law or act was valid, notwithstanding the repugnancy. While this court will search through the record to ascertain whether a federal question did actually arise, was mooted and decided in the court below, either directly or by necessary implication, it is supposed that the opinion of the court given in deciding

the case, will furnish the best evidence of the character of its rulings upon the questions decided. We think it will be found, from the opinion of Judge Orton, 48 Wis., p. 407 to 411, that the court considered the constitutionality of the act of congress, providing that proceedings should be taken in the state court, solely as it was raised in the Circuit Court (Record, pp. 5 and 6,) and that it did not intend to decide whether or not the provisions of chapter 291 of the laws of Wisconsin for 1874 were or were not repugnant to the constitution of the United States.

The decision of the Supreme Court of the state, as we understand it, was, to the effect that by the act of March 3d, 1875, the United States determined to sue and to be sued in the courts of the state in such proceedings as were therein contemplated, and that when it so determined to sue and be sued, it was as amenable in the courts of the state in cases covered by the provisions of the act as any other suitor; that the courts of the state were as open to it as plaintiff as they were to any other plaintiff; that the act of congress which provided that the United States, in case it desired to acquire property, might proceed in the courts of the state to determine compensation, gave to parties who had claims against the United States for compensation, for property taken, the right to institute proceedings against the United States in the courts of the state by notice to the department of justice; and that the same was not in violation of the Constitution of the United States. We cannot see what more there is in the judgment of the Supreme Court of the state than an affirmance of the validity of the act of congress and of the right of the United States to sue and to be sued, if it so wishes, in the courts of the state. If we are right in this, there is clearly no determination by the Supreme Court of the state, that the laws referred to in said act of congress, or any proceeding under such laws,

were or were not valid and obligatory as against any provision of the Constitution of the United States. The question of the constitutionality of the laws referred to was not considered by the state court as arising in this case, and was not decided. It is true that it was argued below, and we have no doubt will be argued here, that it was the intention of the law of 1874 to give to the United States, by an exercise of the power of eminent domain of the state, the right to acquire property for its own uses within the State of Wisconsin; and that it is not within the power of the state to so take the property of the individual and turn it over to the United States. Upon this question there appears to be some diversity of opinion, but in this case, we conceive, it is not necessary to consider it. There is no provision of the Constitution of the United States affecting this question one way or the other, and had the court below decided that the State of Wisconsin could take the property of a citizen of the state, in virtue of its power of eminent domain, and turn it over to the United States, such a decision would not, as it seems to us, have violated any provision of the constitution and hence would not have raised a federal question. It would have constituted a rule of property within the state, having no authority, excepting as an expression of opinion, beyond the territory of the state; and, therefore, would not be a decision coming within the reasons which led to the enactment of the law authorizing writs of error to the Supreme Courts of the states from the Supreme Court of the United States. (*Memphis* v. *Murdock*, 20 Wall. 590). From this argument, if sound, it follows that the right to exercise the power of eminent domain grows out of the necessity of the sovereignty of the state, and not out of the constitution, and that it cannot be exercised in favor of another sovereignty, because the act is not within the necessity out of which the power arises.

Therefore, a decision upon this question, either way, will not touch upon, or in any way be repugnant to the Constitution of the United States. But it is enough to say, that the state Supreme Court, supposing that the case could be decided without passing upon that question, have not attempted to pass upon it. *McManus* vs. *O'Sullivan*, 91 U. S., 578; *Brown* vs. *Atwell*, 92 U. S., 327.

II.

As applied to this case, the act of March 3, 1875, is authority for a proceeding to ascertain compensation, and not one for the exercise of the right of eminent domain. The power of eminent domain was exercised by the state in or prior to 1852. At that time the property of the defendants in error was taken, and ever since, by the state, the companies succeeding, and the United States, has been held adversely to the owner, and is now so held. This seizure by the state was absolute, and one for which, as against the state, the defendants in error had no redress. It was an exercise of the right of eminent domain of the state by the state, and therefore lawful. The state constitution, like the Constitution of the United States, restricts the power of eminent domain by providing for just compensation. It is held by the Supreme Court of the state, that compensation is not a pre-requisite to the right to take when the taking is by the state itself, the presumption being that the state will make compensation if under obligation to do so, and the property of the state being regarded as an ample fund therefor. Powers v. Bears, 12 Wis., 220; Baxter v. State, 10 id., 457; Bohlman v. Railroad Co., 30 id., 165; Bock et al. v. Hishen, 40 id., 674; 1 Redfield on Railways, 148, note

5; Fox v. R. R. Co., 31 Calf., 538; Nichols v. R. R. Co., 43 Me., 356; Young v. Herman, 6 Ga., 130; Astor v. Mayor, &c., 43 N. Y., 410.

When the power is exercised by corporations of the state, the court holds that just compensation is a prerequisite to the right to take. (*Sherman* vs. *Railroad Co.*, 40 Wis., 645). The only exception being where property has been taken with the consent of the owner; and where taken and long held without suit brought by the owner, his consent is presumed from lapse of time, even though the original taking was protested against. (*Sherman* vs. *Railroad Co.*, *supra*, and cases *infra*.)

The taking in the case at bar was by the state, and lawful as against the owner. So far as this case is concerned, the act of March 3, 1875, furnishes a means of securing compensation only. The language of the act applicable thereto is as follows: "In case any lands or other property "are now * * * flowed or injured by means of any "part of the works of said improvement heretofore * * * "constructed, for which compensation *is now* * * * * "*legally owing*, and in the opinion of the officer in charge "it is not prudent that the dam or dams be lowered, the "amount of such compensation may be ascertained in like "manner. The department of justice shall represent the "interests of the United States in legal proceedings * * * "for flowage damages hereinbefore (*heretofore*) occasioned." The words, "in like manner," refer to the words preceding, "in the mode provided by the laws of the state where-"in such property lies." These are the only words of the act which relate in any way to the case now before the court. There is in this language no grant of power to take the property of the individual; but, on the contrary, a clear and plain recognition that such property has already been taken and is now in the possession of the United

States. As applied to such property, the act is necessarily neither more nor less than authority for the United States to sue and be sued in the state courts for the purpose of ascertaining the amount of compensation due. Had the language of this portion of the act been enacted by itself, it is not probable, we think, that any charge of unconstitutionality would have been raised against it.

III.

Regarded either as a suit for compensation or a proceeding for condemnation, the state court had jurisdiction of the case.

Secs. 1 and 2, Art. 3, of the constitution of the United States, define the scope of the judicial power of the United States, and provide that, with the exception of the supreme court, congress shall designate the courts in which this power shall be vested.

The judiciary act of 1789, passed immediately after the adoption of the constitution, undertakes to designate these courts, and to define their powers.

Sec. 11 of the act provides, "that the circuit courts shall have original cognizance, *concurrent with the courts of the several states*, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, *and the United States are plaintiffs or petitioners*," etc. (1 U. S. Stat. at Large, 78).

This act has been regarded as an authoritative construction of the constitution, from the first. The latest amendment to the act, that of March 3, 1875, contains the same language. (Desty's Federal Procedure, p. 71).

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This act has been regarded as an authoritative construction of the constitution, from the first. The latest amendment to the act, that of March 3, 1875, contains the same language. (Desty's Federal Procedure, p. 71).

The act and amended act also specify with marked distinctness the cases over which the federal courts shall have *exclusive* jurisdiction; and in the cases specified, the case at bar is not included. (Desty, p. 106; Sec. 711).

It is claimed that the language of Sec. 11, of the act above quoted, to the effect that the jurisdiction is concurrent with the state court in cases where the United States are plaintiffs or petitioners, is not broad enough to include this case, as in this the United States are *defendants*.

It is a well settled rule of law that the United States cannot be sued without its consent thereto first obtained. (United States v. Clarke, 8 Peters, 436; Reeside v. Walker, 11 How. [U. S.] 272; Carr v. United States, U. S. Sup. Ct. unreported. [U. S. v. Lee, 106, U. S. 196.]

The same rule of law applies to the state. (Const. Wisconsin, Art. 4, Sec. 27.)

To have provided (in terms) that the circuit courts have concurrent jurisdiction "over cases in which the United States are defendants," would be equivalent to consenting in advance that in all cases the United States might be sued. But where a case in which consent has been obtained is of such a character that it does not fall within the class of cases over which exclusive jurisdiction is given, but does fall within the class of cases over which concurrent jurisdiction is given, provided only the United States be plaintiffs, does it not follow that by the act consenting to be sued, the United States has also necessarily consented to be sued in that forum which has jurisdiction over cases of like character? The act of consenting to be sued carries with it of necessity a consent to be sued in some forum.

In determining the *forum*, will not the court necessarily be concluded by the character of the case? All of the seven classes of cases specified in section 711, over which the Federal courts have exclusive jurisdiction, differ entirely in

character from the case at bar. Can any reason be assigned why the *forum* selected to determine the rights of the United States as plaintiffs in a particular kind of action, should not be competent to determine their rights as defendants in a like action? It follows, we think conclusively, that even where the act of congress consenting that the United States be sued omits to designate a *forum*, that that *forum* will be presumed to have been intended which is provided for like actions in which the United States are plaintiffs. But in this case the act authorizing the suit also designates the *forum*.

It is conceded on the part of the appellant, that the proceedings in this case could have been had in the Federal court, but not in the state court.

The act in question provides that the value of the property taken be "ascertained in the mode provided by the laws of the State wherein such property lies." * * * "The department of justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore (heretofore) occasioned."

The mode provided by the laws of the state, "is the mode provided by section 2, ch. 291, laws of 1874." This section provides that, in case any lands have been overflowed or injured or taken by reason of the maintenance or erection of dams, etc., compensation for damages sustained by the owners thereof "may be ascertained, determined and paid in the same manner as prescribed in *ch. 119 of the laws of 1872*, entitled, etc., approved, etc., *for acquiring titles of lands by railroad companies;* and all the provisions of said act may apply in case of the overflowing, injury or taking of lands *by the United States government* for the purposes aforesaid, which are properly applicable thereto."

"The Railroad Act," ch. 119, requires the petition for condemnation to be addressed to the circuit court, or the judge thereof, of the *circuit* in which the property is situated, and to be filed in the office of the clerk of the circuit court of the *county* in which the property is situated. It is apparent,we think, that the forum contemplated in ch. 119 is the state court, and hence, that the forum provided by the act of congress of 1875 is the state court.

Such, too, is the opinion given by the attorney general of the United States. He says: "The reference in that act to the mode provided by the laws of the state, undoubtedly points to the mode provided by the acts of the legislature of Wisconsin of March 2, 1874, ch. 291, and March 22, 1872, ch. 119; and the proceedings authorized by these acts, all, are none other than proceedings to ascertain and determine the compensation to which the owners of lands are entitled for a legal taking or appropriation thereof for public purposes." (See brief of defendants in error.).

George F. Wheeler, Robert H. Hotchkiss and Aaron Walters were appointed commissioners to ascertain the amount of compensation in this case, acted as such and made their award. Congress passed an act in 1877, providing for the payment of said commissioners, which construes the aforesaid act. The language is: "For payment of George F. Wheeler, Robert Hotchkiss and Aaron Walters, for services rendered by them as commissioners, appointed pursuant to an act of congress of March 3, 1875, to appraise damages to lands in Fond du Lac county, Wisconsin, caused by the improvement of the Fox and Wisconsin rivers, five thousand three hundred and ten dollars." (ch. 359, laws 1877–8, p. 222.)

It is here stated that George F. Wheeler and others, who were appointed commissioners in the proceedings in

this case, *were appointed pursuant to an oct of congress of March 3, 1875*,"

It was certainly competent for congress to designate the state court; and equally it was competent to have designated commissioners or arbitrators to ascertain the compensation to be paid, who would act entirely outside of the forms of ordinary judicial proceedings. (Kohl v. United States, 91 U. S. 367; Mills on Eminent Domain, Secs. 347, 348, 349; United States v. Dumplin Island, 1st Barb. S. Ct. 24.)

The right of the United States to exercise the right of eminent domain in the several states is now well settled. (Kohl v. United States, supra; Mills on Eminent Domain, Sec. 347).

Although the state court be the designated forum, it is yet possible that these proceedings might also have been taken in the federal court. (Kohl v. United States, supra; United States v. Fox, 94 U. S. 315, op. 320; U. S. v. Oregon R. & N. Co., 16 Fed. Rep. 524).

And if so, although commenced in the state court, the same were removable into the federal courts. (Warren v. Wisconsin Valley R. R. Co., 6 Biss. 425, Hopkins, J.; Mills on Eminent Domain, Sec. 349).

IV.

The act of March 3, 1875 gives consent that the United States be sued. If not that, it performs no useful purpose whatsoever; and is a mere work of supererogation. Should it be said that it authorizes proceedings to condemn by the United States as petitioners and not proceedings by the land owner, we reply that for that purpose it was

unnecessary. The judiciary act authorizes suits by the United States as plaintiffs and petitioners, and the act declares, and it is held by the courts, that proceedings for condemnation are a suit. (Section 14, Chap. 119, Laws 1872. Warren v. Wis. V. R. R. Co., 6 Biss. 425. United States v. Block, 121; 3 id. 208. Kohl v. United States, *supra.*)

The authority to purchase had previously been given by the several acts under which the United States acquired the works of improvement and the franchises of the company appertaining to the same. The authority to purchase is sufficiently broad to embrace purchases by all modes of acquiring property, including that of condemnation.

The act of March 3, 1875, provides: 1st. That the value of property thereafter taken shall be ascertained "in the mode prescribed by the laws of the state," and 2d, "in case any lands or other property is now * * flowed or injured by means of any part of the works of said improvement heretofore * * constructed, for which compensation is now * * legally owing * * * the amount of such compensation *may be ascertained in like manner.*" The words "in like manner," refer back to the words "in the mode provided by the laws of the state," so that the provision in effect is, that compensation for lands theretofore flowed by means of works theretofore constructed, shall be ascertained "in the mode provided by the laws of the state." What is that mode? The general railroad act, chapter 119, of the laws of 1872, as amended, has been before the state Supreme Court for interpretation in all, or nearly all, of its possible phases; and was adopted by congress in the act of 1875, and incorporated into that act as construed by that court. Among the constructions given are the following: That the initiative in proceedings for condemnation belong exclusively

to the company exercising the right of eminent domain, with one exception. (Sec. 14, ch. 119, Laws of 1872. Sec. 2, ch. 291, Laws of 1873. Sherman v. Railroad Co., 40 Wis., R. 645, op. 652.)

The exception is, where the property has been appropriated by the company without proceedings to condemn, or other legal right, and with the consent or acquiescence of the land owner; in which case the land owner can take the initiative. (Sec. 22, Chap. 119, Laws 1872. Sec. 4, Chap. 291, Laws 1873. Sherman v. Railroad Co., *supra*, op. 651. Driver v. W. U. R. R. Co., 32 Wis. 569. Bohlman v. Railroad Co., 30 Wis. 105. Same 40 id. 157.)

By consent or acquiescence he is debarred from his common law action, and acquiescence for a long time without suit is consent. (Sherman v. Railroad Co., *supra*.)

In providing specially for proceedings according to the mode provided by the laws of the state in cases of flowage damage theretofore occasioned by works of improvement theretofore constructed, does not the act of congress of 1875 clearly recognize the construction given by this court to Sec. 22 of the railroad act, and authorize proceedings thereunder; and does it not show that notice was taken of the fact, in proof in this case, that the land affected, was actually appropriated by the state and the consenting and acquiescing land owner dispossessed, nearly twenty years prior to the commencement of these proceedings? (United States v. Block, 121, 3 Biss. 208; Darlington v. United States, 82 Pa. 382).

V.

Section 2 of chapter 291, laws of 1874, is constitutional. It prescribes the conditions under which the right of eminent domain in flowage suits of a certain character may be exercised, and gives the consent of the state that the United States be permitted, in the exercise by it of the right of eminent domain, to proceed thereunder.

So far as this is a consent by the state that the United States may exercise the right of eminent domain within the state, it may be unnecessary. (Kohl v. United States, *supra*).

So far as it prescribes conditions favorable to the land owner, affecting the *mode* or procedure of exercising the right, it is obligatory upon the United States, when adopted as in this case, by congress. Similar laws were sustained, of Ohio in Kohl v. U. S., *supra;* of Illinois, in U. S. v. Block, 121, *supra;* of New York, in U. S. v. Dumplin Island, *supra;* of Missouri, in U. S. v. Reed, 56 Mo. 565; of Maryland, in Randall v. Bryan, 14 Md., 444.

It was not the intention of the legislature by this act to provide that the state would vicariously exercise its right of eminent domain in behalf of the United States, although the weight of state authority is in support of the right. (Gilmer v. Lime Point, 18 Cal., 229; Burt v. Merchants' Ins. Co., 106 Mass., 356; U. S. v. Dumplin Island (N. Y.), *supra;* U. S. v. Reed (Mo.), *supra;* Reddell v. Bryan (Md.) *supra.*) *Contra:* (Trombley v. Humphrey, 23 Mich., 471; Kohl v. U. S., *supra*).

It was not the intention to authorize suits to be brought against the United States by the injured land owners, as the counsel for plaintiff in error contends. It is conceded that the act would be ineffectual for that purpose. (R. Co. v. Whiton, 13 Wall. 270.)

Other than to prescribe conditions affecting the mode of exercising the right of eminent domain, its sole province in connection with Sec. 2, Ch. 572, Private Laws of 1866, and Ch. 416, Private Laws of 1871, and numerous memorials, is to give consent to the jurisdiction of the United States over the property to be acquired; *i. e.*, to perform the work of ex-appropriation or cession. (Const. U. S., Art. 1, Sec. 8, Cl. 17. Revision, p. 21, and cases cited in Revision; 1 Stat. at Large, 426, Secs. 1 and 2; 10 Op. Att'y Gen'l, 34).

But it is altogether unimportant, in this case, to consider the character of this act as a state law, whether constitutional or not, or even whether continuing in force or not, for by the act of March 3, 1875, it was incorporated therein and thereby became a law of the United States.

No one will deny that it was competent for congress to affix to the act of 1875 all of the conditions of the railroad act, nor deny that any subsequent action by the legislature would be unavailing as affecting a law of congress. (Wood v. Hustis, 17 Wis. 416; Crosby et al. v. Smith, 19 id 449.)

Constitutional or not, continuing in force or not, equally in every case, it aids in interpreting the intention of congress, as expressed in the act of 1875.

VI.

The question whether or not, in the opinion of the officer in charge, the dam can be lowered, can not be determined on an appeal from the award of the commissioners. The only questions reviewable on such appeal are such as affect the amount of compensation.

The railroad act of Wisconsin is substantially the same

as the railroad act of New York, and seems to have been largely taken therefrom. Both acts have received the same construction.

Section (14) of the Wisconsin act provides, that notice shall be given to the land owner. Section (15) provides that on presenting the petition to the court or judge, with proof of the publication of the notice required: "All or any of the persons whose estates or interests are to be affected by the proceedings *may show cause against granting the prayer of the petition.*"

The mode of procedure by which cause shall be shown under this section is not defined, nor is it in the corresponding section of the New York act. The practice thereunder varies; although the practice more generally followed, is for the land owner to file a verified answer to the company's petition.

The issue so made up is triable, at the discretion of the court or judge, by the court or judge, with or without a jury. It may be tried upon the pleadings, or upon affidavits in addition thereto, or upon proofs formally taken; all at the discretion of the court or judge. Each of these modes of procedure seem to have been followed more or less.

It is upon this trial or hearing that the question, whether or not in the opinion of the officer in charge the dam can be lowered, or whether the government intends to maintain the same, must be tried. If not presented at this hearing, at the time specified in section 15 of the act, it is waived. It is at this hearing that the questions affecting the incorporation of the company, its right to take proceedings for condemnation, the nature and extent of the property to which the right extends, etc., all, must be tried and determined. Until determined, there is no occasion for the appointment of commissioners. The act does not purport to

devolve the duty of determining these questions upon the commissioners, nor if it did, could such a delegation of judicial power be sustained. The right to appoint commissioners does not arise until these questions affecting the company's right to proceed have been determined. Hence, an appeal from the award of commissioners takes up for review only the questions affecting the amount of compensation awarded, the appointment of commissioners and their mode of procedure. The only mode of reviewing the company's right to proceed is by certiorari or something in the nature of a direct proceeding. A b ll in equity to review the proceedings has been sustained in the state court, as a direct proceeding. These propositions all seem to have been sustained by the courts, alike of Wisconsin and of New York. (Secs. 14 and 15, ch. 119, Laws of 1872; Sec. 2, ch. 291, Laws of 1873; R. S. Wis., 1878, Secs. 1846 and 1847; Miller v. Rd. Co., 34 Wis. 533; Stringham v. Rd. Co., 33 id., 471; Deidrich v. Rd. Co., 42 id., 248; Burns v. Rd. Co., 9 id., 450; Rd. Co. v. Davis, 43 N. Y., 137; In Matter of Rd. Co., 62 Barb., 85; In Matter of Rd. Co., 66 N. Y., 407). The statute is no longer in force which was construed in Ford v. Rd. Co., 14 Wis., 609.

This construction of the railroad act is fully sustained by a reference to the other sections of the act. Reference only is made to one (Sec. 1854 of Rev. Stat.), in which provision is made for acquiring property already dedicated to another public use. In that case the mode of procedure is changed. The language is: "Such lands may be acquired in the same manner as the lands of others, but the commissioners and not the court, primarily, shall in such cases determine the question of the necessity of taking such land, or any part thereof sought to be so taken, as well as the compensation therefor; *and upon an appeal from their award, all such questions may also be tried;*" * * This is the only class

of cases in which the duty of the commissioners is changed This shows conclusively that in all other cases the question under consideration cannot be tried before the commissioners or be reviewed in an appeal from their award.

So far, we have discussed this question as if the company (the United States) had been the moving party. But this case falls within the exception, where the land owner takes the initiative. It falls under section 22 of the act (Sec. 1852 of Rev. Stat.). The fact in proof in this case is that the lands had been taken by flowage more than twenty years prior to the act of congress and is taken notice of in the act itself, which authorizes proceedings in cases where compensation for lands already taken by flowage occasioned by works already constructed, *might be* "*legally owing*." While the mode of procedure in this class of cases is the same as in the cases where the company has the exclusive right to the initiative, it is apparent that, by the consent or acquiescence of the land owner, the questions affecting the company's right to proceed do not arise. They are waived by the consent or acquiescence. The only questions are those which affect the amount of compensation awarded, the appointment of commissioners and their procedure. While, without the consent or acquiescence of the land owner, this would be a proceeding in the exercise of the right of eminent domain, by such consent or acquiescence it becomes a simple inquisition to ascertain the amount of damages; an inquisition which could be set on foot by either the company or the land owner.

If set on foot by the company (the United States), the filing of petition would be an admission that, in the opinion of the officer in charge, the dam could not be lowered. If set on foot by the land owner, and the officer's opinion be in favor of lowering the dam, it is apparent that it is matter of defence to the land owner's right to proceed, and

should be set up in answer to the land owner's petition, and if not set up, is waived. As matter of fact, on the part of the U. S. the appointment of commissioners was acquiesced in, witnesses for the petitioner were cross-examined, witnesses for the U. S. were produced, and only after appeal taken, was the claim for the first time made; that in the opinion of the officer in charge, the dam could be lowered. It would be absurd to require the land owner, as a condition of proceeding, to prove that, in the opinion of the officer, the dam could not be lowered. There is no evidence outside of the facts already before the court in this case, by which the opinion of the officer could be shown. One officer in charge might hold one opinion, and a succeeding officer another opinion. The officer might not disclose his opinion, or his true opinion. It is apparent that whatever the opinion be, it can only be shown on the part of the United States, and as it goes to the right of the land owner to proceed, must be shown before the appointment of commissioners. It is one of the questions which the statute under which the commissioners are appointed does not submit to them.

It was competent for the officer in charge to have lowered the dam, if in his opinion it tended to promote or even not injuriously to affect navigation, without the aid of the act of March 3d, 1875. The officer was put in charge of the works of improvement in 1872, with the dam at the height at which it stood at the time of the commencement of these proceedings, and ever since then he has continued the same at its then height, for a period in all of eleven years. The neglect to lower the dam for such a period of time should estop the government upon this question. If not, it subjects the officer in charge, and perhaps the gov-

ernment itself, to the censure of working useless injury to the land owner.

A fair interpretation of the testimony given by the officer in charge fails to disclose an approved opinion that the dam can be lowered. "It will not be done, as it would destroy two cities," says the officer. (Record, fol. 286).

VII.

The rules to control the commissioners in ascertaining the measure of damages are those laid dowu in the railroad act, Chap. 119, and were followed in this case.

This question has been considered somewhat under subdivision II. of this brief. As there stated, the act of congress of March 3, 1875, plainly designated the railroad act as the mode of procedure to be followed in these cases; and the act of congress of 1877-8 [Chap. 359, p. 221], providing for the payment of the commissioners who acted in these proceedings, is conclusive upon the question. It recites that the commissioners, who were in fact appointed under the railroad act, were appointed pursuant to the act of March 3, 1875.

The rules applicable to the proceedings in the exercise of the right of eminent domain, under the mill dam act, are clearly not applicable. It has been held by this court that the mill dam act does not apply. (Arimond v. The G. B. & M. Canal Co., 31 Wis., 316).

The rules to be followed by the commissioners in ascercertaining the measure of damages or compensation are laid down in sections 16 and 22 of the act. (Secs. 16 and 22, Chap. 119, Laws 1872; Sec. 4, Chap. 291, Laws 1873; Rev. Stat. Secs. 1848, 1852, 1853).

In case the proceedings are set on foot by the company, the rules are, that the commissioners shall "ascertain and determine *the value of each such tract or parcel of land* proposed to be taken, with the improvements thereon, and of each separate estate therein, *and the damages sustained by the owner by reason of the taking thereof*, and fix the amount of compensation to be made to each of such owners therefor; and in fixing the amount of such compensation, said commissioners shall not make any allowance or deduction from the value of the real estate taken, on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad, or the construction of the proposed improvement connected with such road, for which such real estate may be taken; but special benefits to the real estate adjoining the lands so taken shall be allowed in deduction of any damages sustained by the owner to such adjoining real estate;" but in case the proceedings are instituted by the land owner, the company is authorized to continue in possession of the premises taken, to have stayed, by the court, all actions or proceedings theretofore commenced against it, is protected from injunction, and is permitted to have deducted from the compensation or award made by the commissioners, pursuant to the above rules, any sum of money that it may have previously paid upon any valid mortgage or lien upon the lands taken.

There is no difficulty in the application of these rules to a case wherein the company is the moving party, for in such case the taking which dispossesses the land owner is made after or of even date with the award, and the measure of damages is the value of the property taken at the date of the award, the amount of injury to the adjoining property, and interest on the two sums from that date. But there is difficulty in applying the rules to cases where

the land owner has the initiative, for the reason that in such cases the taking by which the land owner is dispossessed, is made long prior to the commencement of proceedings to condemn, during which time material changes may have taken place in the condition and value of the property taken, and of the adjoining property injured, and in the rights of the several parties. The rights of the several parties may have been lost wholly or in part by the running of the statute of limitations, and the lands taken may have appreciated in value by the construction of the improvement, or the development of the country, or may have depreciated in value, or have been affected in other ways. It is difficult, and possibly not prudent, to formulate a rule which shall control the application of the statute to all cases. One fact, however, should be kept in mind, as it tends to lessen the difficulty and simplify the matter—and that is, that during the whole of this period of time in which the changes have arisen, the company was in possession of the property taken, enjoying its use, and the land owner was dispossessed and deprived of its use.

The question was considered by the Supreme Court of the state, and the rule correctly applied to the facts presented, in the very recent case of Lyon v. Railway Co. Say the court: "It frequently happens, however, that these companies construct and operate their roads over lands which they do not own, without lawful authority. Where condemnation proceedings are instituted in such cases, perhaps after the road has been in operation for years, difficulties sometimes arise in the application of the rules above stated. For example, it has been claimed that the structures which the company has placed upon the land without authority have become a part of the realty, and belong to the owner of the land; and hence, that in a subsequent condemnation of the land, its value, including such

structures, is the rule of appraisement. On the other hand, it has been claimed, that if the construction of the road has greatly injured and reduced the value of the contiguous lands of the owner, such reduced value is the rule of appraisement, without regard to what would have been its value had the road not been constructed. These examples are given because they are pertinent to the present case.

"It seems to us that these propositions rest on the same principle, and that if either is sound, both of them are. If the owner must accept the reduced value of his contiguous lands, caused by the unlawful act of the company, as the basis upon which his damages are to be determined, it seems inevitable that he is entitled to the value of the lands taken, increased by the same unlawful act.

"But we are of the opinion that neither of the above propositions state the law correctly. We think that the land actually appropriated by the company should be appraised at its present value, excluding the structures placed upon it by the company; that is, at what its value would be, had the structures not been placed there; and that the damages to the contiguous land of the same owner, should be appraised on the same principle; that is, on the basis of the present value of the land, or what would be its present value had the railroad not been constructed.

"Manifestly it would be unjust to compel the company to pay the owner for structures placed upon the land by the company at its own expense, and in view of a subsequent condemnation of the land to its use; and it would be equally unjust to permit the company, by its own unlawful act, to reduce the damages to the contiguous lands which otherwise it would be compelled to pay. It is argued that the owner has his common law action for damages done to his land before condemnation by the construction of the rail-

road, and hence that such damages should not be included in the appraisal of the commissioners. Suppose he may resort to a common law action to recover such damages: that is no good reason for allowing the company to take advantage of its own wrong to compel him to do so; *when, had it performed its legal duty in the premises, the whole damage would have been determined in the condemnation proceedings, and multiplicity of actions thereby avoided.*" (Lyon v. R'y Co., 42 Wis., 538).

Change the conditions so it shall appear that, instead of appreciating, the land has depreciated in value, or the land owner has assented to or acquiesced in the taking, and the rule must of necessity be modified. The true rule, as near as it is safe to formulate it, seems to be, that the land owner should have the value of the property taken and the amount of injury to the property not taken to be ascertained as of any point of time, during the period of his dispossession he may elect with interest, from that date.

The company could at any time have condemned the property.

This principle underlies the rule of damages laid down by the same court in the also recent case of Aspinwall v. R'y Co. Say the court: "The owner of property taken for public use is entitled to be paid the value of the property at the *time of the taking*. This is the just compensation of the constitution, Article I, Sec. 13. He is entitled to nothing more. He cannot be compelled to accept anything less. He is to be made good by an equivalent in money for the loss he has sustained by being deprived of his property. * * *

"We think the statute (chap. 119, *supra*) is in entire accord with the constitution, in that it provides that the owner of land condemned shall be paid the value thereof *at the time of the taking* or condemnation. * * * The rules

prescribed by sections 16 and 21, by which the appraisement is to be made, are not new. They were well established by the decisions of this court before chapter 119 of 1872 was enacted." (Aspinwall v. R. R. Co., 41 Wis. 474.)

That the measure of damages is the value as above defined at the time of taking, with interest up to the assessment, is held in many cases. (Reid v. R. R. Co., 105 Mass. 303; R. R. Co. v. Macomb, 60 Maine, 290; R. R. Co. v. Bussen, 61 Penn. St. 369; Whitman v. R. R. Co., 7 Allen, 313; Parks v. Boston, 15 Pick. 198; R. R. Co. v. Mahoney, 29 Cal. 112; 21 Ohio, 334; Mills on Em. Dom., Secs. 148, 174, 175, 176, 216, 218, 65–76.)

The statute of limitations applies not only to cut short the time for which interest can be recovered, but also to deprive the land owner of the right to compensation itself. The right of the land owner to compensation is "founded upon the title to real property, and its enforcement is limited to twenty years" by Sec. 3. Chap. 138, R. S. 1858, and possibly a shorter time by Secs. 6 and 7, of the same chapter. (Gilman v. R. R. Co., 40 Wis., 653.)

The special remedy for compensation is barred by the statute whenever a common law action for the injuries complained of would be also barred.

In an action of trespass for the yearly injuries complained of, recovery can be had for only those which were suffered within the six years next preceding the commencement of the action. The measure of damages in such case is the interest for such period of time, on the value as above defined, of the property taken; and hence the right to interest is confined to the period of six years preceding the commencement of an action. (Pierce on Am. R'y Law, 230, note (1); Forster v. R. R. Co., 23 Penn. St., 371.)

The *time of taking* is the actual time of appropriation,

so as to dispossess the land owner, when such appropriation is by *permission of the land owner. This permission may be express or implied; and mere delay in bringing action, although the appropriation was originally protested against, is held to be permission.* (Sherman v. R. Co., 40 Wis., 651; Andrews v. The Farmers' Loan & Trust Co., 22 id., 288, 295, 296; Bohlman v. R. Co., 30 id., 105; Pomeroy v. R. Co., 25 id., 641, 644; Kennedy v. R. Co., 22 id., 581; Park v. Boston, 15 Pick., 198. Whitman v. R. Co., 7 Allen, 313, 326; Rand v. Townshend, 26 Vt., 670.)

When, however, the appropriation is without the permission of the land owner, either express or implied,the time of taking is held to be the actual time when the right to the property is acquired by legal proceedings. (Driver v. R'y Co., 32 Wis. 569.)

In Pomeroy v. Railroad Co., *supra*, the court refers to the rule as established, "requiring the value of the land taken to be assessed with reference to the condition of the property at the time of the taking" (or actual appropriation), and holds that "damages recovered for a trespass in entering upon plaintiff's land and constructing and using a railroad thereon should probably be deducted in subsequently determining the amount to be allowed as compensation for the taking of such land." (Mead v. Heim. 28 Wis., 533.)

Subsequent to the making of this decision, the principle here laid down was incorporated into the general railroad act as section 22, amended by sec. 4, ch. 291, laws of 1873 (Rev. Stat. sec. 1852).

The damages under the rule given by the court in this case are less than the damages would have been according to the rule contended for.

The value of the property actually taken, at the time of

the appraisement, with interest thereafter, is one item. The depreciation in the rental value or use of the injured property not taken, for the six years next preceding the commencement of proceedings for condemnation, is the other item. It will be observed that nothing whatever is given for the permanent injury to the property not taken; and it must be conceded that the depreciation in the rental value or use for six years, is a mere fraction of the permanent injury. The defendant land owners are not objecting on this account, and the plaintiff in error cannot.

It may well be doubted whether by continuing to occupy the lands taken, pending the appeal from the award, the United States has not waived the right to all kinds of objection. (Lee v. R. Co., 33 Wis., 222).

VIII.

"*Compensation*," as used in the railroad act and in the act of congress of March 3, 1875, as applied to this case, necessarily covers all the damages from flowage, past, present and future, and whether arising when the state, the companies or the United States were in possession of the works of improvement.

Neither the railroad act nor the act of congress of March 3, 1875, contemplate more than one appraisement.

In Pomeroy v. C. & U. W. R. R. Co., supra, the court holds, that "damages recovered for trespass in entering upon plaintiff's land, and constructing and using a railroad thereon, should probably be deducted in subsequently determining the amount to be allowed as *compensation* for the taking of such lands;" and this principle was subsequently incorporated in section 22 of the railroad act (R.

S., sec. 1852,) by language as follows: "and in case such corporation * * * shall have paid to the owner of such lands * * * having any valid mortgage or *other lien thereon*, any sum of money on account of such lands, such sum, with interest thereon * * * shall be deducted from the award made by said commissioners." * * * In Lyon v. R'y Co., supra, the court say: "It is argued that the owner has his common law action for damages done to his land before condemnation, by the construction of the railroad, and hence that such damages should not be included in the appraisal of the commissioners. * * * Had it (the company) performed its legal duty in the premises, *the whole damage would have been determined in the condemnation proceedings*, and multiplicity of actions thereby avoided." (42 Wis. op. 546).

We have already seen that in ascertaining compensation, the measure of damages is the value at the time of the taking by which the land owner is dispossessed, etc., with interest up to the assessment, and with, as we think, the right of option on the part of the land owner to take such value, etc., as of any time during the period of his dispossession. In Mills it is stated, "The appraisement embraces all *past, present and future damages* which the improvement may thereafter reasonably produce." (Mills on Eminent Domain, sec. 216).

By the use of the word "compensation" in the act of March 3, 1875, and the incorporation into that act of the provisions of the railroad act, congress adopted the construction which the courts of this state and other courts have given to the word "compensation," and thereby recognized the obligation of the United States to pay the damages occasioned by the dam in question while the canal company was in possession of the works of improvement.

The word appears to have been used *ex-industria*, and must have the construction claimed for it.

The obligation of the government to pay the damages arising while the canal company was in possession, rests, first, upon the award of the arbitrators selected to ascertain the amount to be paid by the United States to the canal company for the works of improvement, and the proceedings leading to the award; and, second, upon the adoption by congress of the taking by the state, by means of which the land owner was dispossessed.

So far as the obligation rests upon the award, it grows out of the proper construction of the act of congress of July 7th, 1870, under which the award was made. The proviso of Sec. 2, requiring the arbitrators to take into consideration the amount of money realized from the sale of lands granted by congress to the state to aid in the construction of said water communication, "which amount shall be deducted from the actual value thereof, as found by said arbitrators," *in effect requires* the arbitrators acting pursuant thereto to award to the company not less than the portion of the cost of the work paid by the company from its own resources; certainly not less than such portion of cost, diminished by its proportion of the depreciation from wear and decay. If the government is to be credited with the full amount of its contribution to the cost of the work, to-wit: the full amount realized from land sales, it should also bear its proportion of the depreciation from wear and decay. Flowage damages, for the payment of which the company's liability was first determined after the award was made, are an element of cost, and, according to the theory of the award and the views of the arbitrators expressed in communications subsequently made, should have been included therein. In relation to this, it is sufficient to say, that, upon full consideration, the

Assistant Judge Advocate General of the United States reached the conclusion that the United States had assumed the liability of the company, and gave his opinion in writing to that effect to the Secretary of War; (Record, p. 170.) and also under the direction of the Secretary of War, for the express purpose of relieving the company from "flowage litigation," prepared the bill which, slightly modified, was enacted as the act of March 3, 1875. So far as the obligation rests upon the adoption by congress of the taking by the state, it is fully discussed in the opinion of the Attorney General of the United States, given in the brief of defendants in error.

From this opinion, it will be seen that the Attorney General holds that "by mere operation of law the United States is liable for the damages arising while the Canal Company was in possession; that it has assumed the original taking and hence is liable." (Pfeifer v. R. Co., 18 Wis., 164.)

The same doctrine has been twice again announced by the same court in the cases of Gilman v. R. R. Co., 37 Wis., 317, op. 320; Gilman v. R. R. Co., 40 Wis., 653; the court holding, that, while reserving the question whether an action of debt would lie against the new company upon a judgment for compensation recovered against the old company, the new company being created by the incorporation of purchasers of the property and franchises of the old company under foreclosure sale; yet, that the plaintiff would have his remedy in another form of action to compel the new company to make compensation or stop running its cars. Such a remedy a court of equity would afford.

The ground of liability is founded upon the principle that the new company has seen fit to adopt and ratify the original taking, and therefore is bound to make compensa-

tion. The maxim *qui sentit commodum, sentire debet et onus*, applies.

The same doctrine is laid down in Green's Brice's Ultra Vires, ed. 1875, point IV, p. 546, citing Prouty v. R. Co., 52 N. Y., p. 63, and many cases.

It appears in proof in this case that the dam in question was constructed in or prior to 1852 nearly to its present height (record, fol. 349); that the proceedings for condemnation were commenced in April, 1875 (record, fol. 11), more than twenty years thereafter; and that the trial court instructed the jury that if the dam caused the flowage and injury in question more than twenty years prior to the filing of the petition, the action was barred by prescription (record, fol. 414).

This instruction would have been fatal to the recovery, had it not also been in proof that in or about the year 1868 an action in trespass by the same plaintiff (defendant in error Pumpelley) was brought against the Canal Company to recover damages for the injuries sustained by such flowage, during the six years next preceding the commencement of said action. The bringing of this action prevented the bar of the statute of limitations, or title by prescription, and must have been so held by the court. There are many cases now pending against the United States similar to this one, and in comparatively few of which only is the statute prevented from running by the commencement of similar actions against the company.

In a great majority of the cases, it is believed that the bar is perfect. The right of the United States to interpose the defence of the statute or plea of prescription depends upon the question, whether or not it has assumed the taking originally made by the state itself. If as purchaser under the state, it has not assumed the taking made by the

state, but is held to have first seized or taken the property in 1872 at the time of the transfer, it will be unable to avail itself of any statutory or prescriptive bar, and may be multched in damages in an amount destructive of all hope of the ultimate completion of an enterprise, in which the public interest is great, and upon which much money has has been expended. However much the United States may be dissatisfied with the amount of compensation awarded in this case, it certainly has great interest in having this question settled in favor of its assumption of the taking made by the state.

Not only is it in the interest of the United States that this question be so determined, but it is, we think, well settled law, that the United States has assumed the taking made by the state and has assumed the liability of the Canal Company, and is liable to the land owner for full compensation covering all damages arising since the original taking, excepting such as are barred by the statute of limitations.

By acquiescence in the taking, the land owner is debarred from his common law remedy.

The special remedy given by the act of congress of March 3, 1875, is the *only mode* provided, for ascertaining compensation or damage, and *must be pursued.* (Cheney v. Lockwood, 16 Wis. 296, &c.)

Although the action in trespass was properly commenced against the canal company, the right to proceed therein was cut off by the act of March 3, 1875. "A change in the remedy applies at once, not only to the existing causes of actions, but to existing actions themselves, unless provision in the statute be made to the contrary. Only vested rights are safe." (Mills on Eminent Domain, Secs. 87 and 93; Pinkham v. Chelmsford, 109 Mass. 225; The statute contemplates but *one* award; Sec, 22, ch. 119,

Laws 1872, amended by Sec. 4, ch. 291, Laws 1873; Pierce on Am. R. R. Law, pp. 224-228; 1 Redfield on Railways, 383).

The Canal Company makes the claim, that the United States has assumed its liability for flowage damages, relying upon the statute which gives to this court on error to the Supreme Courts of the states, jurisdiction over "federal questions" only. (Murdock v. Memphis, 20 Wall. 590.)

B. J. STEVENS, *Madison, Wis.*,

E. MARINER, *Milwaukee, Wis.*,

Attorneys for the G. B. & Miss. Canal Co., in behalf of Defendants in Error.

APPENDIX.

Act of Congress of March 3, 1875.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries or other material lying adjacent or near to the line of improvement, and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of, and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now, or or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dams or dams be lowered, the amount of such compensation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned.

SECTION 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid, not exceeding in amount twenty-five thousand dollars, may be applied in payment for the property and rights taken and used as aforesaid.

"Approved March 3, 1875."

Chapter 291, Laws of Wisconsin of 1874.

"Sec. 2. In case the lands of any person have been overflowed or injured, or if it shall be found necessary or proper hereafter to overflow, injure or take the lands of any person for or by reason of the construction of any dam, bridges, locks, or pier, or the repair or enlargement thereof, or the construction, repair or enlargement of any canal or other works by the United States government in the improvement of any harbor, river or stream of water in this State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured or taken as aforesaid, may be ascertrined, determined and paid in the same manner as provided in Chap. 119, of the Laws of 1872, entitled 'An Act in relation to Rail Roads, and the organization of Rail Road companies,' approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of said act may apply in case of the overflowing, injury or taking of lands by the United States government for the purposes aforesaid, which are properly applicable thereto."

Railroad Act.

Synopsis of Chapter 119, Laws of 1872.

Chap. 119, of the Laws of Wisconsin, for the year 1872, is a general law regulating the organization and government of railroads in the State of Wisconsin. For the purpose of condemning lands for railroad purposes, commencing at sec. 14, it provides in substance as follows; The filing of a petition by the railroad company in the office of the Clerk of the Cricuit Court of the county in which the land is situated. The petition must state a correct description of the land to be taken, the names of the owners, or parties interested in the land, and certain other allegations here immaterial. The act provides that from the time of the filing of such petition the "proceeding shall be considered a suit pending in the Circuit Court of said county." On that petition the court aforesaid appoints three commission-

ers, "three disinterested and competent freeholders, who reside in the county, or some adjoining county, where the premises to be appraised are situated." These commissioners fix the amount of compensation to be paid to the owners of the lands taken, and file their report in the office of the Clerk of the Circuit Court of the county in which the land is situated. Either party to the proceeding may appeal from the award of the commissioners to the said Circuit Court, and have a new trial before a jury in that court. The report of the commissioners is to be recorded by the Clerk of the Circuit Court in the Judgment Book of said court, and the amount of the award may be paid by the railroad company into the hands of such clerk.

Sec. 22 of this chapter also provides that, "in every such case the party interested in such real estate may institute and conduct the proceedings to a conclusion," (referring to the proceedings above recited,) "if the company delays or omits to prosecute the same, at the cost and expense of the company."

Sec. 56 of this chapter 119, expressly repeals sec. 1, of chap. 175, of the Laws of Wisconsin for the year 1861, but leaves in full force sec. 2, of said chap. 175, Laws of 1861, which provides: "Any person owning or interested in any land upon which the track of any railroad shall have been constructed, or which shall have been appropriated by any railroad or railway company without compensation having first been made therefor, shall have the right to have commissioners appointed at the expense of said company, or to call out the commissioners authorized by the charter of such company, in the same manner that such company could have said commissioners appointed, or call them out; and the award of such commissioners shall have the same effect as if the appraisal had been made at the request, or upon notice of the said company, with the right to either party to appeal from the said award in the time and manner prescribed by the charter of such company."

109-513

Supreme Court
Of the United States.

NUMBER 38.

THE UNITED STATES, *Plaintiff in Error*,
vs.
FRANK L. JONES, *Administrator of the estate of* GEORGE J. PUMPELLEY, *deceased;* JAMES K. PUMPELLEY, *and* EDWIN C. GRAY, *Defendants in Error.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF ASSOCIATE COUNSEL FOR DEFENDANTS IN ERROR.

GEO. E. SUTHERLAND,
Associate Counsel for Defendants in Error

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IN ERROR ~~IN~~ THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF ASSOCIATE COUNSEL FOR DEFENDANTS IN ERROR.

In this case I desire to discuss two questions—

FIRST:

Does the act of Congress, approved March 3, 1875, known as Chap. 166, in terms, consent to the jurisdiction of the State Courts in the proceedings therein con- 2

templated? In other words, is it the intent of that act that the damages therein referred to, may be ascertained in the State Courts?

SECOND:

If that act does consent to such jurisdiction, then is it, and the correlative act of the Wisconsin Legislature, unconstitutional and void?

The act of Congress in question reads as follows:

3 "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands, for canals or cut-offs, or to use any earth, quarries or other material lying adjacent or near to the line of improvement, and needful for its prosecution or maintenance, the officers in charge of said works may, in the 4 name of the United States, take possession of, and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now, or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. The Department of Justice shall rep- 5 resent the interests of the United States in legal proceed-

ings under this act, and for flowage damages hereinbefore occasioned.

"SECTION 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid, not exceeding in amount twenty five thousand dollars, may be applied in payment for the property and rights taken and used as aforesaid.

"Approved March 3, 1875."

The mode provided by the laws of the State of Wis- 6
consin for ascertaining the damages contemplated by the above act is found in Sec. 2, Chap. 291, of the Laws of Wisconsin, for the year 1874, and in Chap. 119, of the Laws of Wisconsin, for the year 1872.

Sec. 2, Chap. 291, Laws of 1874, reads as follows: "In case the lands of any person have been overflowed or injured, or it it shall be found necessary or proper hereafter to overflow, injure or take the lands of any person for, or by reason of the construction of any dam, bridge, lock, or pier, or the repair or enlargement 7
thereof, or the construction, repair or enlargement of any canal or other works by the United States government in the improvement of any harbor, river or stream of water in this State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured or taken as aforesaid, may be ascertained, determined and paid in the same manner as provided in Chap. 119, of the Laws of 1872, entitled 'An Act in relation to Rail Roads, and the organization of Rail Road companies,' approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of said act may apply in case of the overflowing, injury or 8

taking of lands by the United States government for the purposes aforesaid, which are properly applicable thereto."

Chap. 119, of the Laws of Wisconsin, for the year 1872, is a general law regulating the organization and government of railroads in the State of Wisconsin. For the purpose of condemning lands for railroad purposes, commencing at Sec. 14, it provides in substance as follows: The filing of a petition by the railroad company in the office of the clerk of the Circuit Court of the county in which the land is situated. The petition must
9 state a correct description of the land to be taken, the names of the owners, or parties interested in the land, and certain other allegations here immaterial. The act provides that from the time of the filing of such petition the "proceeding shall be considered a suit pending in the Circuit Court of said county." On that petition the court aforesaid appoints three commissioners, "three disinterested and competent freeholders, who reside in the county, or some adjoining county, where the premises to be appraised are situated." These commissioners
10 fix the amount of compensation to be paid to the owners of the lands taken, and file their report in the office of the clerk of the Circuit Court of the county in which the land is situated. Either party to the proceeding may appeal from the award of the commissioners to the said Circuit Court, and have a new trial before a jury in that court. The report of the commissioners is to be recorded by the clerk of the Circuit Court in the Judgment Book of said court, and the amount of the award may be paid by the railroad company into the hands of such clerk.

Sec. 22 of this chapter also provides that, "in every
11 such case the party interested in such real estate may

institute and conduct the proceedings to a conclusion," (referring to the proceedings above recited,) "if the company delays or omits to prosecute the same, at the cost and expense of the company."

Sec. 56. of this chap. 119, expressly repeals sec. 1, of chap. 175, of the Laws of Wisconsin for the year 1861, but leaves in full force sec. 2, of said chap. 175, Laws of 1861, which provides: "Any person owning or interested in any land upon which the track of any railroad shall have been constructed, or which shall have been appro- 12
priated by any railroad or railway company without compensation having first been made therefor, shall have the right to have commissioners appointed at the expense of said company, or to call out the commissioners authorized by the charter of such company, in the same manner that such company could have said commissioners appointed, or call them out; and the award of such commissioners shall have the same effect as if the appraisal had been made at the request, or upon notice of the said company, with the right to either party to appeal from the said award in the time and manner prescribed by the charter of such company." 13

FIRST.

Does the foregoing act of Congress consent to the jurisdiction of the State courts?

I.

The answer must be given in view of the entire legislation.

When we put the act of Congress, of March 3, 1875, chap. 291, Laws of Wisconsin, 1874, and chap. 119, Laws of 1872, together, we have a clear, consistent method laid down for determining the amount of compensation 14

to be paid for lands taken by the United States. In effect it is the same as if the act of March 3, 1875, had incorporated in its body the above recited provisions of chap. 119, Laws of Wisconsin, for 1872, for the filing of a petition, the appointment of commissioners by the Circuit Court, and the making and recording of an award. That is to say, eliminate from the act of March 3, 1875, the reference to Wisconsin Statutes, and put in its place the statutes referred to, and the act provides, "that whenever in the prosecution and maintenence of
15 the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin * * * any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, * * * the amount of such compensation may be determined by the filing of a petition therefor by the United States, in the office of the clerk of the Circuit Court of the county in which the land is situated, correctly stating the description of the lands to be taken, and the names of the owners thereof,
16 or parties interested therein, which proceeding from the filing of such petition shall be deemed an action began in the Circuit Court of that county. Upon such petition said court, or the judge thereof, shall appoint three commissioners, who shall be freeholders of the same, or some adjoining county, who shall make and file an award of damages for the taking with the clerk of the Circuit Court of that county, and thereupon the United States may pay the amount of such award to the said clerk of court, subject to the right of either party to appeal and have a new trial before a jury, in the Circuit Court of that county; and in case the United States delays, or
17 omits to institute such proceedings, the party interested

may do so, with the same force and effect as if commenced by the government."

This, I submit, is the clear meaning of these several acts, which must of necessity be construed together, and being so construed, must unquestionably confer jurisdiction upon the State courts.

II.

Again, it must be the intent of the act of Congress, March 3, 1875, that proceedings thereunder should be taken in the State courts, for the following reasons: 18

First.—The court named in the "mode of procedure," is the Circuit Court of the county in which the lands lie; and there is such State court, but no such United States court. This provision is definite and clear, and it is not permitted to construe that which has no need of construction.

Potter's Dwarris., on Statutes, page 143.

19

Second.—The clerk who files the papers, dockets the judgment, and records the award, is the clerk of the Circuit Court of that county. The records are all made up in the county where the land is situated, so as to show a perfect title, and a completed condemnation there, where the record of titles is kept. No construction is needed of this provision.

Third.—The proceeding *is an action* pending in the Circuit Court of the county. In Kohl *vs.* the United States, 91 U. S. Rep., 367, such proceedings were expressly held to be an action. Further, it is an action 20

affecting the title to lands; and, under the Wisconsin Statutes, triable in the county where the lands lie.

Fourth.—If an appeal is taken, the cause is to be tried before the same Circuit Court of the county where the lands lie, and a jury empanelled, as juries are ordinarily drawn in that court.

Fifth.—The United States courts, in no sense, answer these requirements. If application is made there, under
21 the above provisions as a mode of procedure, is it to be made to the District or Circuit Judge? Are all the records to be filed and kept by the clerk of the United States Court? How are the county records to show the condemnation? If an appeal is taken, is the case to be tried by the District or Circuit Court? And how shall it be tried?

Sixth.—The phrases used in the act of March 3, 1875, "in the mode provided by the laws of the State," * * * and "in like manner," necessarily cover and include the forum ~~forms~~ prescribed by the laws of the State, the same as is
22 substantially held in the Kohl case above cited. "Mode" and "manner," as used in such a connection, necessarily include the forum ~~former~~; and in fact the mode prescribed by the laws of the State can not be followed unless proceedings are brought in the State courts. I do not contend that the government can not proceed to condemn lands in the United States Courts, under the judiciary act of 1789, but I do say that when proceedings are taken under the act of March 3, 1875, as supplemented by chap. 291, Laws of Wisconsin, for 1874, the clear intent is that they be taken in the State courts; that one of the elements, and an inseparable element of the "mode" prescribed is
23 the State court. As well might you say that an exem-

plified copy of the proceedings of a state court when certified by a United States court setting in that State, is sufficiently authenticated, as to say that you have condemned lands for the government in the mode prescribed in the State statutes, when they have been condemned in the United States court. The formula of authenticating the document may be the same in either case, but in prescribing the "mode" of authentication Congress necessarily included in the mode a certificate from a particular forum, although not specifically so stated. (See Sec. 24
905 Wis. U. S. Statutes.) Suppose Congress to have legislated on the partition of lands among Indians in the State of Wisconsin, and to have said that lands may be partitioned among them in the same manner that lands are partitioned among citizens of the State, as provided by the State statute. Now, the statute provides for an action in the Circuit Court of the county where the lands lie. Would any one contend that Congress meant anything else than that the Indian should apply to the same court in case he sought to partition lands?

Seventh.—Every act must be construed so that it shall have force and meaning. "It is not to be presumed 25
that the legislature intended any part of a statute to be without meaning." (Potter's Dwarris on Statutes, page 145.) The force and meaning of an act to be found by a reference to the existing condition of things, and the end sought to be accomplished. The act of March 3, 1875, is not a meaningless formula of glittering generalities. It has a definite object in view of a definite situation of affairs. In the first place, it is an act limited to the State of Wisconsin. It is based on the fact, established by proof in the case at bar, that the United States government had purchased, and was then maintaining as a necessary part of the work of the Improvement of the 26

Fox and Wisconsin rivers, a dam at the outlet of Lake Winnebago, which permanently flowed the lands of private persons. It recognizes the lawe nunciated by this court in Pumpelley *vs.* Green Bay Co., 13 Wallace, 166, that such flooding of lands is a "taking," in the exercise of the right of eminent domain, by the government.

It recognizes the obligation of the United States to make compensation for such taking; and the correctness of the doctrine of the Pumpelley case, namely, that it is
27 a settled principle of universal law that the right to compensation is an incident to the exercise of that power, (the power of taking private property for public use,) and "that the one is inseparably connected with the other."

It recognizes the further fact that the State of Wisconsin, willing, and even anxious, that the just rights of her citizens should be protected, had already opened her courts and provided a mode of procedure therein for determining the compensation the private citizen should receive for such flowage of lands by the general govern-
28 ment.

It also recognizes the fact that the government is often tardy in its movements, and so by adopting the Wisconsin mode of procedure, which gives the land owner the right to institute proceedings, it assured the injured party that he had rights which even the government was bound to respect.

Now if it be said that this act of March 3, 1875, did not consent to the jurisdiction of the State courts, it emasculates the entire act.

The government might condemn lands in its own courts at any time, without any special authority from
29 Congress. (Kohl *vs.* The United States, 91 U. S. Rep.,

367.) So that the act of March 3, 1875, conferred no additional power whatever, and gave no new right unless it gave the land owner the right to proceed in the State courts. Without such construction the act becomes a recognition of the just rights of the injured parties, but coupled with a cruel and needeless taunt, "get them if you can." It makes the solemn acts of Congress a by-word, and declares the United States Statutes a piece of rhetoric with no meaning. Surely the court will give no such construction, but will rather give a liberal interpretation to accomplish the beneficent objects of the leg- 30
islative act.

III.

Additional light is thrown upon the question when we consider that when Congress, by the act of March 3, 1875, adopted the Wisconsin mode of procedure for the condemnation of lands, the Supreme Court of that State had already construed one of the provisions of the railroad law now under consideration. In Andrews *vs.* Loan and Trust Co., 22 Wis., 288; and in Bohlman *vs.* R. R. 31
Co., 30 Wis., 105, the court had held that the right to acquire private property for public use, and the right to compensation therefor were inseperable; that when a railroad company has gone into possession of land with the acquiescence or consent, express or implied, of the land owner, then the right to institute proceedings to obtain compensation therefor devolves upon the owner. This principle received full confirmation in Sherman *vs.* R. R. Co., 40 Wis., 645. In the latter case the court said: "The construction given recognizance that there are two ways only by which a railroad company can lawfully enter into possession of land not acquired by purchase; 32

upon making just compensation under its exercise of the right of eminent domain, or by permission of the owner. In the latter case the owner waives compensation as a condition precedent, but not the compensation itself. He therefore assumes to himself the process of ascertaining the compensation which would otherwise have devolved upon the railroad company." The initiative is with the railroad company, but if it fails to act, then the right to proceed devolves upon the land owner. The record in this case shows that when the act of March 3,
33 1875, was passed, the United States had been in possession of the land for several years; that is, the government had been in possession "by permission of the owner." But the owner had no remedy, because it was a sovereign State in possession. The effect of the passage of the act of March 3, 1875, and the manifest intent of it, was to give the land-owner the same remedy that he would have were a railroad company in possession; and no one could claim that if a railroad company were in possession, the land-owners would be compelled to seek the redress in a United States Court.
34

IV.

It is a significant fact that Congress has repeatedly adopted similar legislation to that now under consideration, and being acts in *pari materia*, they help to a proper understanding of the act of March 3, 1875. For instance, on page 367 of the Statutes of the United States, 1878–1879, act approved March 3, 1879, there is an appropriation for improving a part of the Tennessee River, and providing that whenever it becomes necessary to take private property, "the price to be paid shall
35 be determined, and the title and jurisdiction procured,

in the manner prescribed by the laws of the State of Alabama."

On page 193, of the Statutes of the United States, 1879–1880, act approved June 14, 1880, there is an appropriation for reservoirs on the head-waters of the Mississippi, and a provision that "injuries occasioned to individuals by overflow of their lands shall be ascertained and determined by agreement, or in accordance with the laws of Minnesota." And on the same page of the same act, there is a general provision attached to the River and Harbor Bill of that year, that "such parts of the 36
money appropriated by this act for any particular improvement requiring locks and dams, as may be necessary in the prosecution of such improvement, may be expended in the purchase voluntarily or by condemnation as the case may be, of necessary sites; *Provided*, that such expenditure shall be under the Secretary of of War; and, *provided* further, that if the owners of such lands shall refuse to sell them at reasonable prices, then the prices to be paid shall be determined, and the title and jurisdiction procured, in the manner prescribed by 37
the laws of the State in which such lands or sites are situated."

On page 481 of the Statutes of the United States, 1880–1881, act approved March 3, 1881, there is a further appropriation for reservoirs on the head waters of the Mississippi, and a provision that "compensation for any private property taken or appropriated for any of said improvements, and all damages to private property caused by the construction of any of said dams, by flowage or otherwise, shall be ascertained and determined under and in accordance with the laws of the State in which such private property is situated;" and on the 38
following page, in the same act, is found a general pro-

vision of the same tenor as that in the act of the previous year.

On pages 203 and 204, of the Statutes of the United States, 1881–1882, being the River and Harbor Bill, passed over the President's veto, there is a full provision for condemning, taking and flooding lands, &c., in the construction of reservoirs on the head waters of the Mississippi. This provision, with great particularity, confers jurisdiction upon, and provides that the proceed-
39 ings shall be taken in the United States Courts. This last provision has for its object precisely the same end accomplished by the above cited provisions from previous acts, but provides a different forum. This is a clear legislative recognition that proceedings under former acts were intended to be had in the State courts, but now shall be in the United States Courts.

V

Again, the provision for the payment of Wheeler and others, commissioners appointed by the State Court, in
40 the case at bar and other cases, found on page 222, of the Statutes of the United States, 1877–1878, act approved June 20, 1878, is a further legislative recognition of the jurisdiction of the State Courts, under the act of March 3, 1875. These commissioners trace their authority back to this act of March 3, and if that gave no consent for the State Court to take jurisdiction, the entire proceedings were void. Congress had no more business to pay these men than it would commissioners appointed by the King of Siam. The provision for payment is a clear recognition that Congress intended and expected the act of March 3, 1875, to consent to the jurisdiction of the State
41 Courts. It is further a notorious fact, that at least in

the State of Wisconsin, the government under these various acts of Congress afore recited, and instructions from the Attorney General's office, has taken the initiative, and instituted condemnation proceedings in the State Courts, following the precise procedure prescribed by the State statutes, and has thus conceded the jurisdiction of the State Courts in all cases where it sought to condemn lands for its own uses. The homely maxim that what is sauce for one is sauce for another, would seem to apply with great force.

42

VI.

But it may be said that the act of March 3, 1875, does permit the United States to condemn lands in the State Courts, but it does not consent that the United States shall have proceedings brought against it in the the State courts, by the land owner to assess damages to lands taken.

My reply is, that this right of the land owner is an essential element of the mode of procedure prescribed and adopted by the act of March 3, 1875. 43

As already shown, the Supreme Court of the State of Wisconsin had held the right of the land owner to proceed, in case the railway company failed to do so, perfect under the railroad law, and his right to obtain compensation an important element of the exercise of the right of eminent domain by the railway company. The act of Congress adopted the mode of procedure, and must have adopted the construction already given to it by the State Supreme Court.

The act of Congress says that when lands have been taken, the damages may be ascertained in the mode pro- 44

vided by the State law. This procedure is set in motion by a petition filed either by the railroad company, or by the land owner. The mode of procedure includes both these factors. If the right of the land owner to file the petition and set the proceedings in operation, is denied, you take from the "mode" a vital part of it. It is not strictly condemnation proceedings, set in motion by the land owner, but just what the act of Congress provides for, "the ascertainment of damages for lands taken."

45 I think the proper construction to be given the act of Congress is, that it is a consent to have proceedings instituted against the government to ascertain damages where the United States has taken lands, and omitted to have condemnation in the regular form.

If this is not so, the act is of no use. The government by its strong hand, had taken the lands, and might condemn, but did not. Congress stepped in, and said, here is a wrong which shall be righted.

In fact did, just what this court said, in Langford *vs.* United States, 101 U. S. Rep., 343, ought to be done by
46 general law.

SECOND.

Then, if this act of March 3, 1875, does consent to the jurisdiction of the State Courts, is that act and the correlative act of the Wisconsin Legislature, chap. 291, Laws of Wisconsin, for 1874, unconstitutional and void?

I.

It will be at once conceded that the United States can not be sued in any court without its consent, but on
47 the other hand it is equally clear that the United States

may submit itself to an action in court. In a recent case, United States *vs.* Clamorgan, 101 U. S. Rep., 828, the Court in passing upon an act of Congress, says "that an action under that statute is substantially an action of ejectment, in which the United States consents to be a defendant." In Beers *vs.* State of Arkansas, 20 Howard, 529, the Courts say that a sovereignty "may, if it thinks proper * * * permit itself to be made a defendant in a suit by individuals, or by another State." See also:

48

State of Rhode Island *vs.* State of Massachusetts, 12 Peters, 731.

State of New Jersey *vs.* State of New York, 5 Peters, 283.

United States *vs.* Clarke, 8 Peters, 444.

State of Virginia *vs.* State of West Virginia, 11 Wallace, 439.

Reeside *vs.* Walker, 11 Howard, 290.

Kohl *vs.* United States, 91 U. S. Rep., 375.

Carr *vs.* United States, 98 U. S. Rep., 437.

United States *vs.* Lee, 16 Otto, 196.

49

But it is claimed that under Sec. 2, article 3, of the United States Constitution, the United States courts have exclusive jurisdiction of all actions where the United States is a party, and that consequently the State Courts can not, in any event, take jurisdiction. The section referred to provides that the judicial power of the United States "shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties under, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases

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of admiralty and maratime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states," &c.

In commenting on this provision, Judge Story, in Martin *vs.* Hunters, Lessee, 1 Wheaton, 304, says:

" It is plain that the framers of the Constitution did contemplate that cases within the judicial cognizance of the United States, not only might, but would arise in the
51 State Court in the exercise of their ordinary jurisdiction."

Chief Justice Marshall in one of his masterly opinions says: " It has been generally held that the State Courts have a concurrent jurisdiction with the federal courts in cases to which the judicial power is extended, unless the jurisdiction of the federal courts be rendered exclusive by the words of the 3d article," Cohens *vs.* Virginia, 6 Wheaton, 264. In Teall *vs.* Felton, 1 Com stock, 543, the question whether the United States Constitution conferred upon the United States Courts exclu-
52 sive jurisdiction of the cases enumerated was under consideration, and the court in discussing the Constitutional provision says: " This is a mere grant of jurisdiction to the federal courts, and limits the extent of their powers, but without words of exclusion, or any attempt to oust the State Courts of concurrent jurisdiction in any of the specified cases to which jurisdiction extended prior to the adoption of the constitution. The apparent object was not to curtail the powers of the State Courts, but to define the limits of those granted to the federal judiciary." This case went to the Supreme Court of the United States, and this court not only affirmed the judgment, but adopted and quoted the language above given.
53 See Teall *vs.* Felton, 12 Howard, 292; also see Delafield

vs. The State of Illinois, 2 Hill, 164. In the case of Clafflin *vs.* Housman, 93 U. S. Rep., 130, the subject is very ably considered, and the conclusion squarely reached that the jurisdiction conferred by Sec. 2, Art. 3, U. S. Constitution, is not exclusive of the State Courts, not even to the extent intimated in Martin *vs.* Hunters Lessee. His Honor Mr. Justice Bradley, in giving the opinion of the Court, employs this unmistakable language: "The general question, whether State Courts can exercise concurrent jurisdiction with the federal courts in cases arising under the Constitution, laws and 54
treaties of the United States, has been elaborately discussed, both on the bench and in public treatises, sometimes with a leaning in one direction, and sometimes in the other, but the result of these discussions has, in our judgment, been, as seen in the above cases, to affirm the jurisdiction, where it is not excluded by express provision, or by incompatibility in its exercise arising from the nature of the particular case."

See United States *vs.* Ravara, 2 Dallas, 297.
Pettilon *vs.* Noble, 7 Biss, 449. 55
Bank of Montpelier *vs.* Hubbard, 49 Vt., 1.
Ordway *vs.* Bank, 47 Md., 217.
United States *vs.* Groff, 4 Hun., 634.
Home Ins. Co. *vs.* Railway Co., 32 Iowa, 223.
"The Wave," *vs.* Hyer, 2 Paine, 131.
Johnston *vs.* Stimmel, 89 N. Y., 117.
United States *vs.* Clarke, 8 Peters, 444.

In this connection I would call the attention of the Court to the fact that Congress has repeatedly consented to the jurisdiction of the State Courts in proceedings 56
where the United States is a party, and such jurisdiction

has often received the sanction of the courts, both directly and indirectly.

See Act of Congress, Sept. 24, 1789, Ch., 20, Sec. 11.
" " " June 5, 1794, " 49, " 9.
" " " June 9, 1794, " 65, " 12.
" " " July 6, 1797, " 11, " 20.
" " " March 8, 1806, " 14.
" " " April 21, 1806, " 49, " 4.
57 " " " Feb. 24, 1807, " 20.
" " " April 21, 1808, " 51.
" " " Aug. 2, 1813, " 39.
" " " March 3, 1815, " 101.
" " " April 10, 1816, " 44, Sec. 17 & 18.
" " " March 3, 1845, " 43, " 17.

United States Statutes, 1874, Secs. 2010, 3833, and 5328.

Supplement to same, Chapter 137.

From the above authorities and acts of Congress, the conclusion is inevitable that there is nothing in the Con-
58 stitution prohibiting the United States from becoming a party in the State Courts.

II.

But argument is made that it is incompetent for a State Legislature to open the courts of the State to the United States as a party in condemnation proceedings on what may perhaps be called general constitutional grounds. Two cases are cited in support of the position taken. Trumbley *vs.* Humphrey, 23 Michigan, 471, and Darlington *vs.* The United States, 82 Pa. St., 387.
59 These cases, however, do not so decide. In the first case

the Legislature of Michigan had passed "An act purporting to authorize and empower the Governor to sieze and take possession of any land, not exceeding one hundred and sixty acres, within the State, for the purpose of conveying the same to the United States, for the erection and maintenance of light-houses thereon. For this purpose he was to appoint three commissioners, who were to enter upon, and take possession of the land in the name of the State, cause the same to be surveyed, and plotted, assess the value thereof, and fix the compensa- 60
tion to be paid by the State therefor. Their decision was to be filed within twenty days after being made, and thereupon the title to the land seized was to be vested absolutely in the State, and the owners and claimants of the land were to be paid from the State Treasury the sum awarded. And the Governor was further empowered to convey the land so seized to the United States, on being paid the amount awarded, together with the expenses incurred in the proceedings."

In the opinion Judge Cooley says: "The only question we are to discuss is the authority of the State in
cases in which the right of federal action is unquestion- 61
able, to step in and act for it;" and the case simply holds that while the State of Michigan may condemn private property for its own use, it can not condemn property for other uses; that is, it can not condemn property for another State or sovereignty to use. Judge Cooley nowhere attempts to say that it is incompetent for the legislature of Michigan to permit the United States to appear in the State Courts, and there exercise its sovereign right of condemnation. The difference between the State of Michigan condemning property, vesting the title absolutely in the State, under condemnation proceedings
for the purpose of a sale for consideration to the general 62

government, and simply saying that the general government may condemn land for its uses, in the State Courts, is so wide that no argument against the one can be drawn from the other. In fact, Judge Cooley, in that opinion says: "We do not doubt that the appropriation would have been effected had the United States seen fit to accept the land, and the owners to have received the compensation awarded." In the case at bar, the United States *has* accepted the land, and peaceably occupies it; and the owner is more than willing to receive the com-
63 pensation awarded. The only difficulty is, he can not get it. The distinction is world-wide between consent by a State for the government to be a party in the State Courts in an action, and an action actually brought by a State to condemn lands in its own right, to subsequently sell to the United States. The one is a legislative permit for jurisdiction; the other is a suit in court for anomalous purposes. The exercise of the right of eminent domain is the exercise of a political, not a judicial, right or power. In the Michigan case the State of Michigan attempted to exercise this power, not for itself
64 but for another, and Judge Cooley could very properly hold it incompetent. In the case at bar the United States has exercised its power to take, and has taken and holds for its own use. The State of Wisconsin has not taken these lands for the United States. It simply says to the government, "having taken, or in case you desire to take the lands, you may have the compensation ascertained in the State Courts." The State of Wisconsin does not propose to condemn any of this land. The State of Wisconsin does not purpose to say that it is necessary, or not necessary, for the United States to have or hold any land within its borders. That is a right
65 belonging to the general government. If the govern-

ment does take, the State Courts are open for determining compensation. That is all.

In the Darlington case there had been an act of Congress—act of March 3d, 1873—authorizing the Secretary of the Treasury to condemn land in Pittsburg, for United States Court House site, in pursuance of the statutes of Pennsylvania. The Legislature of Pennsylvania had provided—act of April 22d, 1873—that the United States might proceed to condemn a site in the same manner as lands were condemned in that State for railway pur- 66
poses. It appears that the government was attempting to condemn several different sites at the same time, with a view of selecting one from the lot; and there was a failure to follow the statutes for the condemnation of land for railway purposes. The opinion seems to hold that it was entirely competent for the United States to proceed to condemn lands for one site, under the statute but "it did not create a roving commission, to experiment on the values of different sites. * * * It could not be held to justify proceedings against an indefinite number of sites at the same time, and thus chaffing with the respective owners for the lowest price." The opinion 67
further on also says that in proceedings under the act of 1849, (The railroad act,) "there must be a *taking* Here there was none. There was experiment and chaffing; nothing more." So the court held the proceedings bad. This is all there is legitimately in the opinion. However the learned court seemed to take it for granted that an act of a State Legislature, giving permission to the government to condemn lands in the State Courts is an exercise of the right of eminent domain by the State, and the opinion proceeds to say that one sovereignty can not condemn lands for another sovereignty, and cites the case of Trombley *vs.* Humphrey. The learned court 68

does not note the difference between the Michigan case and the case then at bar; a distinction Judge Cooley himself notes in his work on Constitutional Limitations, page 526. In the Michigan case, the State of Michigan actually sought to condemn lands to sell to the United States. In Pennsylvania there was no such attempt. The effect of the Pennsylvania act was to open the State courts for the United States to condemn lands in, if it saw fit. So the Pennsylvania Court did not have before it the same question the Michigan Court had, and the
69 enunciation of the general doctrine of the Tromblay case was hardly called for. It is also noticeable that nowhere does the Darlington case decide that, had the United States proceeded to condemn in accordance with the State statute, the State Court would not have taken jurisdiction.

But the Darlington case cites Stimer *vs.* Lime Point, 18 Cal., 229, and Burt *vs* Insurance Co., 106 Mass, 366, as opposed to the Pennsylvania decision, and the Michigan case, and the same position was taken on the argument of this case in the court below. I do not under-
70 stand these cases to be opposed to each other. The California legislature had passed an act, February 14, 1859, to permit the United States to condemn certain lands in the State Courts for governmental purposes. The Court held this a proper and Constitutional legislative permission. There was no attempt on the part of California to condemn lands for the United States, and there was no attempt to secure a roving commission for experiment and chaffing.

In the Burt case, the Massachusetts Legislature had passed an act—Chap. 327, Laws of Mass., for 1870—giving permission for the United States to purchase or con-
71 demn lands in Boston for Sub-Treasury and Postoffice

sites, by proceedings in a State Court. It was claimed that such an act was incompetent and void, but the Court held otherwise. The learned Chief Justice in his opinion—106 Mass., 362 and 363—cites a number of other similar acts under which the government had proceeded, and very pertinently says: "These and several other acts not cited, show that the Legislature has habitually authorized the United States to acquire lands by an exercise of the right of eminent domain. * * * It is now too late to question the validity of such acts. Even if there 72
could have been any doubt about it originally." It seems to me that the Court here recognizes the correct distinction, that, while the State may provide a method of procedure in the State Courts, it is still the general government that exercises the right of eminent domain. It is the government which acts, though it may be through the agency of the State Court. So that I feel justified in saying that there is no real conflict in the essential principles of the cases above cited.

But if there is such a conflict, as is claimed, between these cases, I submit it can have no bearing upon the case at bar, because the facts are entirely different. In each 73
of the four cases above cited, the legislation preceded the taking, and contemplated a future taking. In the case at bar, the taking was by the United States years before there was any legislation, either by Congress or by the State of Wisconsin.

And further, in some of the cases at least, the State legislative act did, in terms, give consent to the United States to condemn lands. It might, perhaps, be properly held that so far, the acts were nugatory, because the government already had the power. An act of a State legislature which attempted to give Congress the right to
declare war, would undoubtedly be held inoperative, but 74

if the same act contains other provisions of a proper character, the rule should be applied to reject the bad, and retain the good, and it seems to me the Darlington case should have observed this distinction.

But Chapter 291, of the Laws of Wisconsin, for 1874, makes no attempt to give the United States the power or right to condemn lands, nor does it attempt to consent that the United States may take any land. The act, seemingly, *ex industria*, leaves that to the government.
75 It does not encroach on the right of eminent domain, as it exists in the United States. It simply provides that the government does take; the damages for such taking may be ascertained in the State Courts.

It states in unambiguous language that if the government has taken lands, or "*if it shall be found necessary*, or proper hereafter to overflow, injure or take the lands of any person," the damages may be ascertained in the mode provided. "Found necessary" by whom? Certainly not by the State. The State has finished its part of the work. But if the government in its prosecution
76 of internal improvements, finds it "necessary" to take or injure lands, the damages may be ascertained in the State Courts.

There is nothing in the nature of sovereignty which prevents the United States from entering the State Courts to protect its rights.

Colton *vs.* United States, 11 How., 229.
Dugan *vs.* United States, 3 Wheat., 181.

The right of eminent domain is a right possessed by
77 the United States, and I see no reason why this right

may not be secured in a State Court as well as elsewhere.

Neither is the act of March 3, 1875, an attempt to delegate to the State the right of eminent domain possessed by the government. The United States must employ some agency, some tribunal, and the act of March 3, 1875, having been passed after the enactment of Chap. 291, of the Laws of Wisconsin, for 1874, is simply selecting a new tribunal, in which the government may proceed, under a mode of procedure with which that tribunal is familiar. How can it be said that if the government 78
proceeds to condemn lands in the United States Courts, the proceeding is proper, but it it proceeds to do the same thing in a State Court, it is improper? It is the exercise of the right of eminent domain *by the government*, in either case, and the fact that the State Legislature has consented that the government may use the State Courts, does not change the nature of the proceeding.

But the act of March 3, 1875, and Chap. 291, Laws of Wisconsin for 1874, contemplate two classes of cases.

First.—Cases where land has already been taken by 79
the government. That is the case at bar. The force and effect of both acts is, to provide that in such cases, the damages may be ascertained in the State Courts. It is difficult to see why this is not perfectly proper. The government having taken the land, there certainly can be no reason why compensation may not be assessed in any tribunal in which the government consents to appear.

Second.—Cases where it is purposed to take lands *in futuro*. The acts do not say, and do not mean, "purposed by the State to take lands for the government," but if the government, in the exercise of its sovereign
right, proposes to take lands, it may do so in the State 80

Courts. The power to take is not delegated; a new agency is chosen, that is all.

The Kohl case is decisive that this is a proper exercise of Congressional power. Congress might have specifically provided in the act of March the 3d, 1875, that the United States could proceed in the State Courts and the method of procedure. How then can it be claimed that all the legislation becomes void, because the State Legislature prescribes the details of the procedure, instead of the act of Congress?

81 It can not be claimed that the passage of an act by a State Legislature opening the State Courts to the general government to condemn lands, is an exercise of the right of eminent domain by the State. For, suppose, that when Chapter 291 of the Laws of Wisconsin for 1874, and when the act of Congress of March the 3d, 1875, were passed, the United States had not flowed a foot of land in Wisconsin, and did not flow a foot for the next year. The passage of these acts certainly would not condemn any land. They are valid, permissive acts. To have
82 effect if the occasion arises, but there is no exercise of the right of eminent domain, by placing these acts upon the statute books. But suppose, after the year, the United States builds a dam and actually does flood land. The moment land is flowed there is a taking, and the taking is by the United States, not by the State. The dam is built, and the water set back by the United States, and this is the taking, not some previous act of the Legislature providing a means of ascertaining the damages in case of a taking. The act of the legislature is affords means of redress to the land owner, but it is neither an active or passive agent in the matter of taking.

When a railroad company enters upon land for rail-
83 way purposes, under State statutes, it may very properly

be held that the State right of eminent domain is exercised, for the railroad company is deemed the public agent for that purpose.

Cooley on Constitutional Limitations. 537–538. A railroad company has no right to take a rod of land without the State authority, and it ought to make compensation before actual entry.

But the United States may take such land as it needs, without any authority from the State, and without first making compensation. 84

Cooley on Constitutional Limitations, 559–562.

When the government desires to take land for public uses, it does not have to assume the position of a beggar at the doors of a State legislature. It can take by virtue of its sovereign right. But having taken, if the government desires to assess the damages in the State Courts, then State legislative aid is properly invoked, as to the mode of proc dure.

To that extent, I say, State legislation is proper and Constitutional. 85

III.

I also desire to suggest a view which seems to me of great importance.

In nearly every State in the Union, the United States has acquired land, upon which expensive government buildings have been erected. The proceedings in these cases, to obtain title for the United States, have very largely, been taken under permissive acts of the several State legislatures, similar in purport, and general scope, to the one now under consideration. 86

If it shall be held that all such legislation is void, where will it leave the title to this vast property? And can it be possible that all these Congresses and State legislatures have been mistaken as to their powers? And how did this Court come to decide the case of Harris *vs.* Elliott, 10 Peters, 25, as it did? That was a case where the United States had taken land in a State Court, under a permissive act of the Massachusetts legislature, and this Court affirmed and approved the proceedings.

87 I have been compelled to prepare this brief in advance of the brief of the Appellant in error, but the points discussed are those urged in the court below, and such as doubtless will be presented to this court; and I submit that the following propositions are established:

1 --That the act of Congress of March 3d, 1875, does in terms consent to the jurisdiction of the State Courts

2.—That such is the proper and strictly legal interpretation of it; and such has been the repeated legislative interpretation of it; and without that interpretation
88 it is meaningless.

3.—That such is also its manifest intent, and necessary scope, and includes in its meaning the right to proceed in the State Courts, at the instigation of the land owner.

4.—That the United States may certainly consent to be a party to a proceeding in Court.

5.—That Section 2, of Article 3, of the United States Constitution, does not confer upon the Federal Courts exclusive jurisdiction in the cases enumerated, and hence the United States may submit itself to a State Court.

6.—That the cases cited as holding it incompetent
89 for a State to condemn lands for the United States, are

not applicable, because the facts in each of those cases, which turned the decision, are entirely different from the facts in the case at bar; and because the State of Wisconsin has, in no way, attempted to exercise the right of eminent domain for the government.

7.—That none of the cases cited hold that a State Court can not take jurisdiction of proceedings to ascertain damages to lands taken by the United States.

8.—That Chap. 291, of the Laws of Wisconsin, for 1874, does not condemn any lands; is not the assertion 90
of the right of eminent domain in any form; does not even attempt to consent that the United States may condemn. It only provides a mode of ascertaining the damages where the government has exercised, or proposes to exercise, its sovereign right of taking.

9.—That the act of Congress of March 3d, 1875, does not delegate the right of eminent domain, but simply designates the agencies to be employed in the exercise of that right, which, undoubtedly, is in the power of Congress.

10.—That although the Courts of the State are open 91
for the government, it is still the United States which exercises the right of eminent domain in those Courts.

11.—That the government by the exercise of the right of eminent domain, took the lands in question years before any legislation on the subject, and the only question in the case is the ascertaining of the damages which is proper to be determined in any forum in which the United States consents to appear.

12.—That it would be extremely hazardous to hold void all legislation under which the government has acquired vast property.

13.—And that the case of Harris *vs.* Elliott is a vir- 92

tual affirmation by this Court, of the competency of the legislation now under consideration.

GEO. E. SUTHERLAND,

Associate Counsel for Defendants in Error.

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109-513

OFFICE SUPREME COURT U.S.
FILED
OCT 9 1883
JAMES H. McKENNEY, CLERK.

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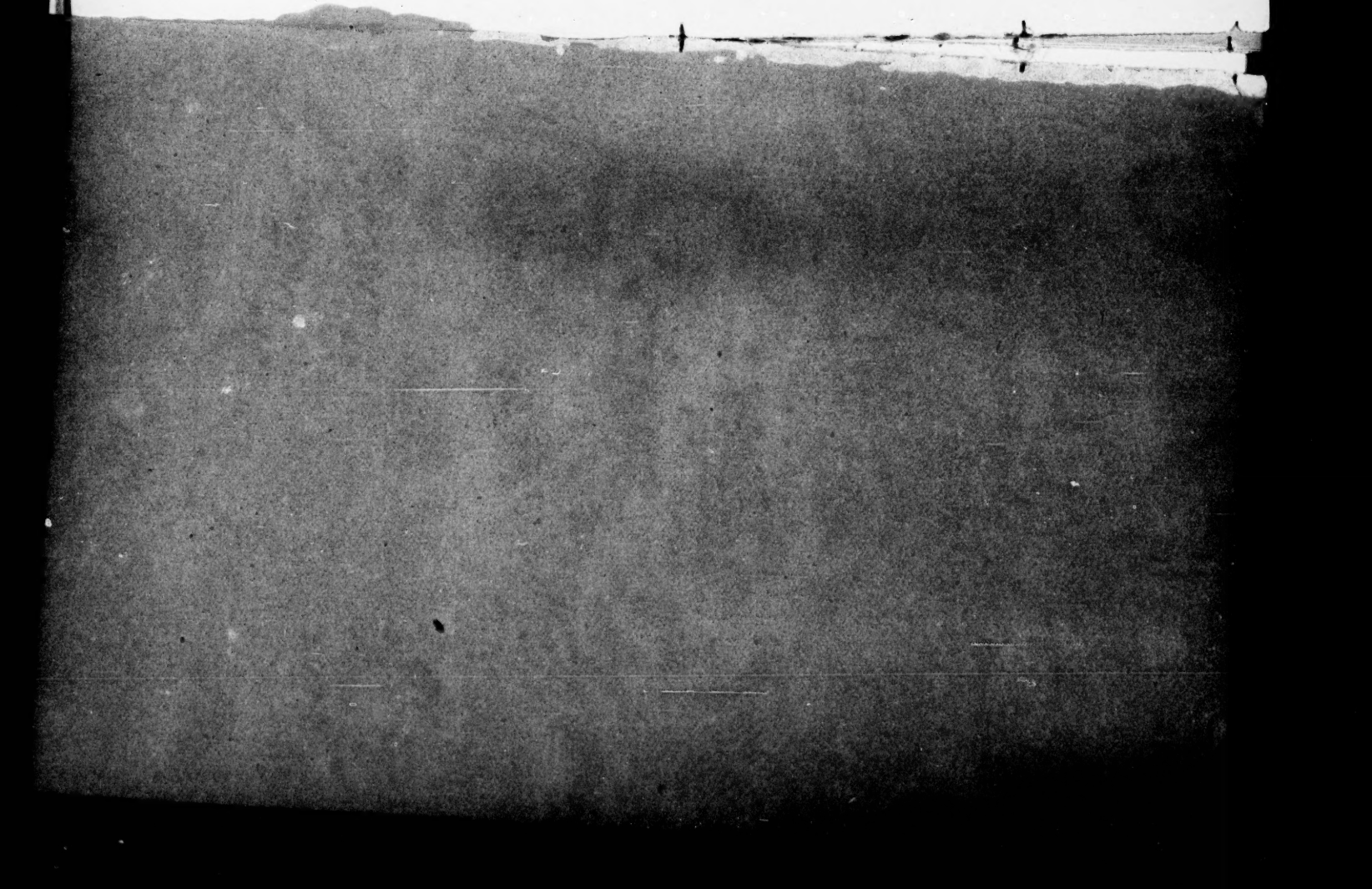

In the Supreme Court of the United States.

OCTOBER TERM, 1883.

THE UNITED STATES
vs.
JONES. } No. 38.

BRIEF FOR THE UNITED STATES.

This is a writ of error to the supreme court of Wisconsin upon a judgment rendered against the United States in a suit brought in a State court to recover damages incident to an exercise of eminent domain.

The damages claimed arose from the *soakage*, &c., of lands, because of the raising of the waters of Lake Winnebago by the *improvement* of the Green and Wisconsin Rivers.

Jurisdiction over the case is claimed by the State court under an act of Congress passed in 1875, ch. 166.

The improvement in question was intended to effect a connected navigation from Green Bay, on Lake Michigan, to the Mississippi River, by the way of the Fox and Wis-

consin Rivers. Aided by a grant from the United States, it was begun by the State at an early period, but in July, 1853, was conveyed by it to the Fox and Wisconsin Improvement Company, and, having passed from the latter in 1866 to the Green Bay and Mississippi Canal Company was at last, in September, 1872, conveyed to the United States. (Record, folios 102, 3.)

The act of 1875, ch. 166, is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That whenever, in the prosecution and maintenance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, it becomes necessary or proper, in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands, for canals and cut-offs, or to use any earth, quarries or other material lying adjacent or near to the line of said improvement and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid or secured to be paid the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compen-

sation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned.

SEC. 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid, not exceeding in amount $25,000, may be applied in payment for the property and rights taken and used as aforesaid. (18 Stat., 506, 507.)

The acts of Wisconsin therein referred to are those of 1872, ch. 119, and 1874, ch. 291.

That of 1872, so far as pertinent, provides substantially as follows:

SEC. 14. That any railroad company in order to acquire title to real estate required for its purposes may file a petition for the appointment of commissioners by the proper circuit court, which petition must contain a description of the premises, the owners thereof, &c.

SEC. 15. That persons notified may show cause against granting the prayer of the petition, and if none such be shown the court shall appoint the commissioners.

SEC. 16. That the commissioners shall meet, appraise and fix compensation, and shall file their report in the office of the clerk of the circuit court, and thereupon either party may appeal to that court—such appeal to constitute a suit pending in court, and to be tried by a jury. (Laws of Wisconsin, 1872, pp. 145, &c.)

The act of 1874 (section 2) is as follows: In case the lands of any person have been overflowed or injured or taken, or if it shall be found necessary or proper hereafter

to overflow, injure, or take the lands of any person for or by reason of the construction of any dam, bridge, lock, or pier, or the repair or enlargement thereof, or the construction, repair, or enlargement of any canal or other works by the United States Government in the improvement of any harbor, river, or stream of water in this State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured, or taken as aforesaid, may be ascertained, determined, and paid in the same manner as prescribed in chapter 119 of the laws of 1872, entitled "An act in relation to railroads and the organization of railroad companies," approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of said act may apply in case of the overflowing, injury, or taking of lands by the United States Government for the purposes aforesaid, which are properly applicable thereto. (Laws of Wisconsin, 1874, p. 692.)

The petition in this case was filed on the 21st of April, 1875 (folio 11). Commissioners having been appointed, &c., an award was made of $8,000 as damages. Both parties appealed, and the case was tried at November term, 1876 (folio 14).

Before the cause was called objection was made on behalf of the United States to the jurisdiction of the court, because, "1st, the court had no jurisdiction over the person of the defendant;" and, "2d, the court had no jurisdiction to try a case in which the United States is a party" (folio 15). Both grounds were overruled.

The trial was an extended one, the importance of the

questions in a pecuniary point of view being considerable. At its close verdict and judgment were rendered for $10,000. From this the United States appealed to the supreme court of Wisconsin, and, upon an affirmance by that tribunal of the judgment below, afterwards to this court.

In the supreme court of Wisconsin the counsel for the United States relied upon the above-stated exceptions to the jurisdiction of the State court, and also to certain exceptions duly taken to instructions given or refused to be given to the jury.

To understand some of these exceptions it is necessary to state that the raising of the waters of Lake Winnebago, which caused the injury in question, is due in general to *two* dams at the outlet into Fox River, such outlet being by two channels. The present suit is predicated upon a dam at *Menasha*, the other dam being at *Neenah*.

The matters excepted to below are:

1. The several following instructions to the jury:

(*a*.) "If you find from the evidence given in this action that in the prosecution or maintenance of the improvement of the Wisconsin and Fox Rivers, in the State of Wisconsin, the lands specified in the petition of the plaintiffs were, on the 3d day of March, 1875, and have been since, flowed or injured by means of the dam at Menasha across the outlet of Lake Winnebago, as specified in the plaintiffs' petition, for which compensation was, on the 3d day of

March, 1875, legally owing, and in the opinion of the officer in charge it was not prudent that the dam or dams causing such overflow or injury be lowered, then this proceeding is lawfully instituted; and if you are satisfied from the evidence that the lands described in the petition were and are injured, as set forth in said petition, the plaintiffs are entitled to recover in this proceeding.

(*b.*) "The measure of damages which you will find, if you find for the plaintiffs, is:

"1st. The depreciated value of the use of the land by means of injuries thereto from soakage and flowage, occasioned by the dam at Menasha, down to the time when you shall find that the lands were taken by means of such flowage, not exceeding six years before April 21, 1875, the time of filing the petition.

"2d. The value of the lands so flowed, at the time you shall so find they were taken, by means of such flowage, with interest on the last-named sum to the time of finding your verdict—the aggregate amount of these said items of damage will be your verdict, if you find for the plaintiffs."

2. The refusal of the following instructions requested upon behalf of the United States:

(*c.*) "The plaintiffs cannot recover in this action unless it appears affirmatively from the evidence that in the opinion of the officer in charge of the improvement of the Fox and Wisconsin Rivers it is not prudent that the dam across the north channel or outlet of Lake Winnebago at Menasha be lowered.

(*d.*) "To entitle the plaintiffs to recover in this action the jury must find from the evidence that if the dam at Neenah had never been constructed the dam across the

north channel or outlet of Lake Winnebago at Menasha, as constructed, would have raised the waters in Lake Winnebago and caused the same to flow the lands of the plaintiffs, to their injury.

(*e.*) "If the jury find for the plaintiffs that the lands in question are submerged, injured, or destroyed, by reason of the waters in Lake Winnebago having been raised above their natural level, and flowing upon the lands of the plaintiffs, and that such submerging, injuring, or destruction was the necessary and natural result of the erection of the dam across the north channel or outlet of Lake Winnebago at Menasha, then the true measure of damages is the value of said lands at the time the same were so submerged, injured, or destroyed, with interest on that sum.

(*h.*) "If the jury find from the evidence that the lands described in the petition of the plaintiffs were flowed, injured, or destroyed by the construction of the dam at Menasha, and the raising of the waters in Lake Winnebago, prior to the purchase of said lands by the plaintiff Gray, and to the same extent before said purchase as they were at the time of filing said petition, then there is a misjoinder of parties plaintiff, and the plaintiffs cannot recover in this action.

(*i.*) "There is a non-joinder of parties plaintiff in this action in this, that J. C. Pumpelly, George B. Pumpelly, Charles F. Pumpelly, and Mary S. Pumpelly, heirs at law of George J. Pumpelly, deceased, are not made parties plaintiff, and for that reason the plaintiffs cannot recover."

3. Also, that the court had overruled the objection taken at the time that the case was first called, that it had

no jurisdiction over the case, inasmuch as the United States were parties thereto. (Folios 428 to 432.)

In the opinion of the supreme court of Wisconsin the act of Congress passed in 1875, and given above, did confer the jurisdiction in question. That court affirmed the judgment below also upon the other matters excepted to. (See opinion, &c. Record, pp. 195, &c. 48 Wisc., 385.)

Upon the present writ of error, *being one to the supreme court of a State, and founded upon an objection to jurisdiction*, no objections to the action below can be considered, excepting such as are of a Federal nature.

This excludes, of course, all objections taken as above to the administration of the case at the trial as regards *parties plaintiffs, the measure of damages, and the importance of the dam at Neenah.*

What remains are the exceptions to jurisdiction: 1, *generally;* and, 2, *for want of an opinion by the officer in charge of the improvement, that it is not prudent to lower the dam at Menasha.*

1. As to the immunity of the United States from suit

in a State court, especially in cases like the present: the facts in the present case are, that such jurisdiction was claimed *under an act of Congress*, and that the State courts held that the language of the act cited therefor did confer the jurisdiction.

So far, therefore, no Federal question arises.

But it was contended on behalf of the United States that, by the Constitution, they possess an immunity from suits in State courts, especially from suits concerning their sovereign right of eminent domain, and therefore that the act of 1875, if susceptible of the construction that it gave jurisdiction of the proceedings in question to a State court, was so far unconstitutional. The overruling of this contention gives rise, of course, to a Federal question. (Trebilcock *vs.* Wilson, 12 Wall., 693.)

There is no constitutional provision which expressly gives this immunity in general. There seems to have been no necessity for such a provision, for the immunity exists in the nature of things, and is one common to the United States with all other sovereign powers *whether constitutional* or other. (See Lee's case, 106 U. S. pp. 204, &c.) Violations of that general immunity therefore do not present Federal questions such as are requisite in a writ of error to a State court. (Thompson's case, 93 U. S., 587.)

A question remains in this connection as to any con-

stitutional immunity of the United States *in respect of proceedings in State courts for the exercise of eminent domain by and on behalf of themselves.*

It is to be observed that this is not a case of the exercise of eminent domain by the State of Wisconsin on behalf of the United States, but is one in which the United States are making use of the courts of a State to assess the value of certain property which they claim by virtue of their own right of eminent domain. It is not the State's right of eminent domain that is being exercised on behalf of the United States, but that of the United States on behalf of themselves, the only question being whether Congress can authorize an application to be made in the name of the United States to a court of the State in order to determine the *judicial* element (*i. e.* the measure of the satisfaction due to the owner) in what is otherwise a *political* transaction, *i. e.* the taking of private property. As has been already said, no question can be made upon a writ of error of this sort that the decision below is correct in holding that the act of 1875, *if constitutional*, does confer this jurisdiction. And it is equally true that under that decision it must be assumed that the proceeding in the State court was *in accordance with the State law and constitution.* (Salomons *v.* Graham, 15 Wall., 208.)

No reason occurs to me why the United States may not bring suit in the courts of a State. And that is substantially the case here, the recovery being a mere incident to a transaction in which they are *actors.* Nor, if it were otherwise, does it appear that Congress may not thus inform itself as to what it is proper for the United States to pay to a private person because of a claim which he has

against them. *Payment* after any such determination remains subject to the will of the United States, who, if dissatisfied, may abandon the thing taken, or may initiate other proceedings to the same end in some court of the United States, *it thereby appearing that the question as to tribunal is one of legislative discretion.*

In the earlier history of the country it was not unusual for Congress to rely upon suits in State courts as a means of enforcing incidents to the sovereignty of the United States. The act of March 3, 1815, giving to State courts jurisdiction of suits for taxes, &c., under the direct tax acts then in force, is a notable instance of this; and although since the better organization of the United States courts such legislation is not usual, it may be pertinent to remark here that the direct-tax act of 1862, ch. 98, § 1 (12 Stat. 422), which therein differed from earlier statutes of the same sort, employed assessments made by States, as a means of fixing the amounts due in respect of the various tracts of land therein. Although these statutes were jealously and repeatedly scrutinized, no contention was ever founded upon this feature. (See Turner *v.* Smith, 14 Wall., 553.) Reference to such tribunals, in order to fix values for the purpose of taxation, does not seem to differ substantially from a similiar reference in order to fix values for the purpose of eminent domain. Wherever the question arises it seems to be a matter of more or less *convenience.*

It is to the same purpose to observe that the United States make use of State judges in arresting criminals, and of State courts in enforcing postal laws, and in granting naturalization (Rev. Stat., §§ 1014, 3833, and 2165),

they being in each matter either really or virtually parties to the proceedings, which in their nature strictly concern matters of prerogative that are at once Federal and sovereign.

2. As for the Federal questions involved in the immunity from this suit claimed by virtue of the necessity for an opinion by the officer in charge of the improvement that the dam at Menasha ought not to be lowered, it appears that even if this be not a matter which the court below was empowered to determine as part of the general construction of the statute, still upon a review thereof it is true that what the statute intended was an opinion *carried into effect*. The United States did not intend to be liable for damages caused previously to the transfer unless it should appear that the dam at its then height *was necessary for navigation*. The opinion of the officer, *together with a consequent lowering*, might reasonably be stipulated for as a protection from such recovery. Of course a mere lowering, unless in consequence of an opinion that the injury theretofore received was not caused by works necessary to navigation, might be thought by the parties not proper to shield an assignee from the burden with which it took the improvement *as an improvement*.

Although, as appears above, I have thought it impracticable to maintain this case upon the very narrow ground for contention left in this court, it appeared also that the character of the case required that the above observa-

tions should be made instead of a simple dismissal of the writ of error.

The case is therefore submitted with a formal assignment for error, viz, *that the State court took jurisdiction of the cause.*

S. F. PHILLIPS,
Solicitor-General.

109-513

Supreme Court of the United States.

OCTOBER TERM, 1883.

No. 38.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

FRANK L. JONES, Administrator of the Estate of George J. Pumpelly deceased, JAMES K. PUMPELLY, and EDWIN C. GRAY, DEFENDANTS IN ERROR.

Error to the Supreme Court of Wisconsin.

BRIEF OF THE DEFENDANTS IN ERROR.

NORMAN S. GILSON,
Attorney for Defendants in Error.

Judd & Detweiler, Printers.

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BRIEF OF THE DEFENDANTS IN ERROR.

This action was instituted April 21, 1875, pursuant to an act of Congress and certain acts of the Legislature of Wisconsin, hereafter stated, to obtain compensation for the land of the defendants in error, situated in Fond du Lac county, Wisconsin, flowed and taken by the maintenance of a dam across the north channel of the outlet of Lake Winnebago, at Menasha, in the county of Winnebago in said State, and which channel or outlet is known as the Fox river. The dam which destroyed the land is a part of the Fox and Wisconsin river improvement, and continu-

ously, since 1872 to the present, has been owned and maintained by the Government of the United States. The officers of the Engineer Department have been in charge of the dam as part of said improvement, and Congress has made annual appropriations for the continuation, extension, and maintenance of this work, which appropriations have been expended for that purpose under the direction of the Secretary of War.

It is claimed by the defendants in error, and the proofs established the fact as found by the jury in the trial court of the State, that the dam at Menasha raised the waters of Lake Winnebago above their ordinary level, setting the waters back upon their land 535 acres in extent on the border of the lake, and flooded and submerged the same so as to completely and permanently destroy its value.

This court determined in Pumpelly *vs.* Canal Co., 13 Wall., 166, in an action against the grantor of the United States that the flooding of lands by this very dam was a taking of property, for which the owner was entitled to compensation.

No compensation has been made to us for the land taken, and prior to the commencement of this proceeding no steps were taken by the Government to ascertain what compensation ought to be made.

Our claim is, that the Legislature of Wisconsin invested its courts with jurisdiction, and an appropriate mode of proceedure to determine such compensation, and that the act of Congress waived the exemption of Government from suit in respect to flowage damages occasioned by the dam in question, and consented to the mode provided by the laws of the State to ascertain the amount of such damages.

Land Grant by Congress to the State for the improvement, transfer by the State, and terms of transfer to United States, with statutes authorizing such transfer and facts relating to that subject.

The Fox river from Lake Winnebago to Green Bay ever has been, and is, of the navigable waters of the State of Wisconsin, and of the United States. It was and is navigable in fact, and was declared navigable by the ordinance of 1787, certain acts of Congress, and constitution of this State.

By an act of Congress approved August 8, 1846, a grant of lands by the United States was made to the State of Wisconsin to aid in the improvement of the navigation of the Fox and Wisconsin rivers, and connect the same by a canal.

Section 1 of said act of Congress, (Ch. 170, 9 Sts. at Large, 83,) after the grant of lands, provides that "the said rivers when improved, and the said canal when finished, shall be, and forever remain, a public highway, for the use of the Government of the United States, free from any toll or other charge whatever, for the transportation of the mails, or for any property of the United States or persons in their service passing upon or along the same."

Section 2 provides: * * "That as soon as the Territory of Wisconsin, shall be admitted as a State into the Union, all the lands granted by this act shall become the property of said State, for the purpose contemplated in this act, and no other: *Provided*, That the legislature of said State shall agree to accept said grant upon the terms specified in this act, and shall have power * * * to adopt such kind and plan of improvement on said route, as the legislature

shall from time to time determine for the best interests of said State.

"*Provided, also*, that the lands hereby granted shall not be conveyed or disposed of by said State, except as said improvement shall progress; that is, the said State may sell so much of said lands as shall produce the sum of twenty thousand dollars, and the sales shall cease until the Governor of said State shall certify to the President of the United States that one-half of said sum has been expended upon said improvements, when the said State may sell and dispose of a quantity of said lands sufficient to reimbuse the amount expended; and thus the sales shall progress, as the proceeds thereof shall be expended, and the fact of such expenditure certified in the manner herein mentioned.

SEC. 3. * * * That said improvement shall be commenced within three years after the said State shall be admitted into the Union, and completed within twenty years or the United States shall be entitled to receive the amount for which any of said lands may have been sold by said State. * * *

By an act of the Legislature of Wisconsin, approved June 29, 1848, (p. 16,) the State accepted said grant and assumed the trust thereby conferred. Under an act of the legislature of Aug. 8, 1848, (p. 58,) a board of public works of said State was created, and undertook the duties and trusts imposed upon them for the improvement of the navigation of said rivers.

Subsequently in 1851 or 1852 the said board under a contract with Reed and Doty commenced the erection of a dam across the north channel of said river at the outlet of Lake Winnebago, at a point in the county of Winnebago, near the place where said north channel of Fox river leaves the waters of said lake.

By various acts of the State Legislature the works of the improvement were transferred to the Fox and Wisconsin River Improvement Company, and in 1865 by decree of foreclosure of a trust deed executed by said company, the Green Bay and Mississippi Canal Company became the owner of the improvement works.

Further provision was made in regard to the first grant of lands and an additional grant by Congress, by chapter 248 of 1854, and chapter 285 of 1855.

By the statutes of the State, authorizing the transfers, the ownership and management of the property were subject to the same restrictions, trusts, and conditions imposed upon the State by the acts of Congress making the grants.

Transfer to the United States.

Under an act of Congress passed in 1870, the canal company made an agreement for the sale of the works of improvement of the canal company to the United States. The agreement was made in October, 1870. The consideration was fixed by an award made November 15, 1871, and the deed was dated and delivered about September 18, 1872, and possession delivered to the United States immediately thereafter. (Tr. p. 41.)

By virtue of section 3, chapter 572, Private and Local Laws, 1866; chapter 416, Private and Local Laws, 1871, and numerous memorials, the State of Wisconsin gave its consent to, and approval of such purchase by the United States.

The said act of congress relating to the purchase approved July 7, 1870, entitled "An act for the improvement

of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers," (Public No. 135,) provides, section 2 * "That the secretary of war aforesaid is hereby authorized to ascertain * the sum which ought in justice to be paid to the canal company * * as an equivalent for the transfer of all and singular, its property and rights of property in and to the line of water communication between the Wisconsin river aforesaid, and the mouth of the Fox river, including its locks, dams, canals and franchises or so much of the same as shall in the judgment of said secretary be needed; and to that end is authorized to join with said company in appointing a board of disinterested and impartial arbitrators, one of whom shall be selected by the secretary aforesaid, another by said company, and the third by the two arbitrators so selected *

* *Provided*, that in making their award the said arbitrators shall take into consideration the amount of money realized from the sale of lands heretofore granted by Congress to the State of Wisconsin, to aid in the construction of said water communication, which amount shall be deducted from the actual value thereof as found by said arbitrators.

SECTION 3. * * That no money shall be expended in the improvement of the Fox, Wisconsin rivers until the * * * canal company shall make and file with the secretary of war an agreement in writing, whereby it shall agree to grant and convey to the United States the property and franchises mentioned in the foregoing section, upon the terms awarded by the arbitrators. It is hereby made the duty of the Secretary of War "to transmit to Congress a copy of the report of the arbitrators, upon which Congress may, at its present session, elect to take such property upon making an appropriation to pay the amount awarded."

Pursuant to this act arbitrators were appointed and the amount to be paid on such purchase determined by the award

of such arbitrators. The award fixed the consideration for the works of improvement at what it would cost Congress to build it anew, deducting a reasonable sum for depreciation by wear and decay, and also deducting according to the requirement of the act of July 7, 1870, the amount of money realized on the sale of lands granted by Congress in aid thereof. The value of the works of improvement was fixed at $1,048,070; the amount realized from land sales was ascertained to be $723,070; the value of the water-power was fixed at $140,000; and of the personal property, at $40,000. After deducting land sales, water-power, and personal property, the balance being the consideration paid to the canal company was $145,000.

At the time of the hearing before the arbitrators the only suit then pending had been decided by the United States circuit court for Wisconsin in favor of the Canal Company, and no estimate of this element of the cost of the improvement was or could have been submitted to the arbitrators. Subsequently to the award this court reversed the decision of the circuit court. (Pumpelly *vs.* Canal Co., 13 Wall., 166,) The flowage question was not considered by the arbitrators, having arisen wholly since the award, and the amount to be paid for the right to flow being a part of what it would cost the Government to build the works anew, which, according to the rule laid down by the arbitrators, the Government was by statute required to pay. That sum is not embraced in the award made by them. (T., p. 169.)

The damages to land injured by flowage occasioned by the dam not being considered by the arbitrators, nor embraced in their award, and the United States did not pay for the right to flow the lands injuriously affected. (~~Case~~,

pages 346–7.) Ex. Doc. No. 185, House of Rep., 42d Congress, 2d session, chapter 416, laws of Congress, 1872. Opinion of Attorney General Pierrepont. (Appendix to brief.)

The Government now occupies the same position as it would had, if it originally constructed the improvement itself from the proceeds of the land grant or by other means.

Appropriations by Congress to continue and maintain the improvement.

Since the act of Congress of 1872 for the payment to the canal company, and the acts of 1873, 1874, and 1875 making appropriations for continuing the works of such improvement, hereafter recited in the opinion of Attorney General Pierrepont, Congress has legislated with reference to said improvement as follows: By an act approved August 14, 1876. * * * That the following sums of money be, and are hereby, appropriated * * * to be expended under the direction of the Secretary of War for the repair, preservation, construction, and completion of the following public works hereinafter named. * * * For the imimprovement of the Fox and Wisconsin rivers, $270,000. (Chapter 267 of 1876, pages 133 and 136.)

By and act approved June 18, 1878, in precisely the same terms as the act of 1876, there was appropriated for improving the Fox and Wisconsin rivers, $250,000. (Chapter 264 of 1878, pages 152 and 156.)

By an act approved March 3, 1879, in the same language as the act of 1876, appropriated $150,000 for the repair, preservation, construction, and completion of the same improvement.

Similar acts appropriating various sums for the same object have since been annually enacted by Congress.

Acts of the Legislature of Wisconsin investing its courts with jurisdiction, and providing a mode for ascertaining flowage damages.

After the transfer of the works of improvement to the United States by the canal company, and for the purpose of enabling persons whose lands had been overflowed, injured, or taken by the maintenance of the dams of said improvement, to recover of the United States the damages thereby occasioned, the Legislature of Wisconsin passed the following act:

Chapter 291. (Published March 26, 1874.)

An act to authorize the Governor of the State to convey land to the United States for the purpose of erecting light-houses and other aids to navigation, and for other purposes:

SECTION 1. Whenever the United States desire to acquire title to land belonging to the State and covered by the navigable waters of the United States within the limits thereof for the site of a light-house, beacon, or other aid to navigation, and application is made by a duly authorized agent of the United States, describing the site required for one of the purposes aforesaid, then the Governor of the State is authorized and empowered to convey the title to the United States, and to cede to the United States jurisdiction over the same; provided that no single tract shall contain more than ten (10) acres, and that the State shall retain concurrent jurisdiction, so far as all process, civil or criminal, issuing under the authority of the State, may be executed by the proper officers thereof upon any person or persons amenable to the same within the limits of land so ceded, in like manner and to like effect as if this act had never been passed.

SEC. 2. In case the lands of any person have been overflowed, or injured, or taken, or if it shall be found necessary or proper hereafter to overflow, injure, or take the lands of any person for or by reason of the construction of any dam, bridge, lock, or pier, or the repair or enlargement thereof, or the construction, repair, or enlargement of any canal or other works of the United States Government, in the improvement of any harbor, river, or stream of water in the State, the compensation for damages sustained by the owner or owners of the lands overflowed, injured, or taken, as aforesaid, may be ascertained, determined, and paid in the same manner as prescribed in chapter 119 of the laws 1872, entitled "An act in relation to railroads and the organization of railroad companies," approved March 22, 1872, for acquiring title to lands by railroad companies; and all the provisions of such act may apply in case of the overflowing, injury, or taking of lands by the United States Government for the purposes aforesaid, which are properly applicable thereto.

SEC. 3. This act shall be in force from and after its passage and publication.

Approved March 12, 1874.

Chapter 119, 1872, *Laws of Wisconsin relating to Railroad Companies.*

CHAPTER 119. Laws of Wisconsin of 1872 so far as it relates to the mode of acquiring land by railroad companies and ascertaining the compensation to be paid therefor is contained in sections 13 to 22 inclusive of this act.

Section 13 gives the company the right to acquire title to real estate for the purposes of its organization in the manner, and by the special proceedings prescribed in the act.

Section 14 provides that: "For the purpose of acquiring such title, the said company may file a petition, praying for

the appointment of commissioners of appraisal by the circuit court or the judge thereof, of the circuit in which the real estate described in the petition is situated, such petition shall be signed and verified by the attorney or some other authorized officer of the company. It must contain a description of the real estate which the company seeks to acquire; * * that the land described in the petition is required for the purpose of the construction or operation of the proposed railroad, and that the company has not acquired title thereto. The petition must also state the names of the parties who are in possession of, or who own or have or claim to own or have estates or interests of record in said premises. * * * The petition shall be filed in the office of the clerk of the circuit court of the county in which the land is situated, and from the time of filing the same, the proceeding shall be considered a suit pending in the circuit court of such county."

Notice by publication must be given of the time and place when application for the appointment of commissioners will be made to the court or judge.

Section 15. "On presenting such petition to the court or judge, as aforesaid, with proof of publication as aforesaid, all and any of the persons whose estates or interests are to be affected by the proceedings, may show cause against granting the prayer of the petition. * * * The court or judge shall hear the parties interested, and if no sufficient cause is shown against granting the prayer of the petition, shall make an order for the appointment of three disinterested and competent freeholders, * * commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken in such county, for the purposes of the company, and fix the time and place for the first meeting of the commissioners."

Section 16 provides for oath to be taken by commissioners, notice to be given by them of time and place, they will meet

to consider the amount of compensation, view of the premises to be taken, appraisal of lands, and compensation to be made, and filing their report.

SEC. 17. Within thirty days after the filing of the report of the commissioners in the office of the clerk of the circuit court of the county in which the land is situated, any party may appeal to the circuit court of such county from any award made by the commissioners by filing in the office of said clerk a written notice of appeal. *Upon receiving such notice the appeal shall be considered an action pending in court, subject to a change of the place of trial and appeal to the Supreme Court, as other actions, and shall be entered upon the records of the court by setting down the owner or owners of the land for which such award was made, and who are parties to the appeal, as plaintiffs, and the railroad company as defendant.* Such appeal shall be tried by a jury, unless a trial by jury is waived by both parties; costs shall be allowed to the successful party on such appeal, and if in favor of the plaintiff, be added to the amount of the verdict; if in favor of the defendant, be deducted therefrom; and judgment shall be rendered therein according to the rights of the party.

SEC. 19. After providing for recording report of commissioners, curing defects of title, settling adverse claims to money awarded as compensation, etc., enacts "that either party may except to the decisions of the court, and appeal to the supreme court, in like manner as in actions."

SEC. 19 enacts that upon completion of the proceedings payment of the award, the exclusive use of the land shall vest in the company forever without any other or further act, deed, or conveyance, and the record, or a certified copy thereof shall be *prima facie* evidence of such title in all courts and places.

By Sec. 20 the court shall have power at any time to amend any defect or informality in any of the special proceedings authorized by this act, or to cause new parties to be added, etc.

SEC. 22. In any case where a railroad or railroad company shall not have acquired the title to any land upon which they have constructed their track or tracks, or if at any time after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title in the same manner as if no appraisal had been made; and at any stage of such new proceedings the court may authorize the corporation, if in possession, to continue in possession, and, if not in possession, to take possession, and use such real estate during the pendency of such new proceedings; and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum, or giving security, as the court may direct, to pay the compensation therefor when finally ascertained; *and in every such case the party interested in such real estate may institute and conduct the proceedings to a conclusion, if the company delays or omits to prosecute the same, at the expense of the company.* But no injunction to restrain the operation of the road shall be granted until the compensation has been fixed and determined.

The Act of Congress Providing for the Condemnation of Lands for the Improvement and for the ascertainment of Flowage Damages thereby occasioned.

The act of Congress of March 3, 1875, provides as follows:

CHAP. 166, "An act to aid in the improvement of the Fox and Wisconsin rivers, in the State of Wisconsin.

SECTION 1. That whenever in the prosecution and maintenance of the improvement of the Wisconsin and Fox rivers, in the State of Wisconsin, it becomes necessary or proper in the judgment of the Secretary of War, to take possession of any lands, or the right of way over any lands

for canals and cut-offs, or to use any earth, quarries, or other materials, lying adjacent or near to the line of said improvement, and needful for its prosecution or maintenance, the officers in charge of said works may, in the name of the United States, take possession of and use the same, after first having paid, or secured to be paid, the value thereof, which may have been ascertained in the mode provided by the laws of the State wherein such property lies. In case any lands, or other property, is now or shall be flowed, or injured, by means of any part of the works of said improvement, heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge, it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner. The Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned.

SEC. 2. That a portion of the appropriation now made for the further prosecution of the improvement aforesaid, not exceeding in amount twenty-five thousand dollars, may be applied in payment for the property and rights taken and used as aforesaid."

These two acts, the one of this State, and the other of the United States, authorized the United States or any owner whose lands were injured or taken by reason of being overflowed by the dam or works of the improvement, owned and in the possession of the United States, to proceed under the provisions of Chap. 191, Laws of 1872, as amended by Chap. 291, Laws of 1873, to have the damages as compensation for such injuries and taking ascertained.

Mode of commencing the cause, appointment of Commissioners on notice to the Department of Justice, award of Commissioners, payment of Commissioners by act of Congress, and proceedings in the action.

The Government having taken the lands of the defendants in error, and being in actual possession thereof, by flooding the same by our acquiescence, and the United States having delayed and omitted to institute proceedings under chapter 119 of 1872, on the 21st day of April, 1875, the defendants in error presented and filed a petition to the judge of the circuit court of Fond du Lac county, praying for the appointment of three commissioners of appraisal to ascertain and appraise the compensation and damages to be made to them for the real estate therein described, taken, injured, and overflowed by reason of the dam at Menasha, across the north channel of the outlet of Lake Winnebago.

The land described in said petition was section 1, town 15, range 17 in said county, with certain exceptions therein specified, being, after deducting the exceptions, five hundred and sixty-five acres.

Upon the filing of such petition, the said judge made an order prescribing the notice to be given of the time and place of hearing said petition, etc., and after due notice to the Hon. C. R. Gill, attorney of the United States, and being by appointment an officer of the Department of Justice, to represent the interest of the United States in the proceedings under the aforesaid laws for flowage damages, as provided in said act of Congress, the matter of said petition came on for hearing before said judge, on the 4th day of May, 1875, and on said hearing appeared the said Hon. C. R.

Gill, of the Department of Justice as the attorney for the United States, as well as the attorneys for the defendants in error, and after hearing the attorneys aforesaid, the said judge on the day aforesaid appointed George F. Wheeler, Robert H. Hotchkiss, and Aaron Walters as the three commissioners, and fixed the time of their first meeting. (Tr., p. 5.)

No objection to the making of this order, or to the appointment of the commissioners was made by the United States.

The commissioners, duly qualified, viewed the premises described in the petition, heard the allegations and evidence of the claimants, as well as of the United States, and on the 10th day of August, 1875, fixed and awarded to the claimants, as compensation for damages for lands injured and overflowed in consequence of such dam, the sum of eight thousand dollars.

Hon. C. R. Gill, aforesaid, appeared before said commissioners in their hearings, representing the interests of the United States, introduced testimony on its behalf, and in all respects was heard by said commissioners as the attorney of the United States, and for the Department of Justice, in the matter herein pending before them.

No objection was made by the United States in the proceedings before the commissioners, as to their right, power or authority to appraise and ascertain the compensation to be awarded to the owners for the lands overflowed and taken, or to the making and filing of the award.

Since the making and filing of such award the United States have paid the commissioners for their services herein rendered, by an act of Congress, approved June 20, 1878, enacting and appropriating as follows:

"For payment of George F. Wheeler, Robert H. Hotchkiss and Aaron Waters for services rendered by them as commissioners appointed pursuant to an act of Congress of March 3d, 1875, to appraise damages to lands in Fond du Lac county, Wisconsin, caused by the improvement of the Fox and Wisconsin rivers, five thousand three hundred and ten dollars."

Chap. 359, Laws of 1877-8, page 222.

The United States appealed from the award of the commissioners, to the circuit court of Fond du Lac county.

At the November term of said court, the hearing and trial on such appeal came on for trial before the court and a jury.

After the cause was called, and before the jury was empaneled, the United States interposed an objection to the jurisdiction of the court, on the ground:

1st. That the court had no jurisdiction over the person of the defendant.

2nd. The court has no jurisdiction to try a cause in which the United States is a party.

3d. Chapter 166, act of Congress of March 3, 1875, is unconstitutional, in that it assumes to confer upon a State court authority to try a case in which the United States is a party.

The court overruled the objections, to which the defendant excepted.

Thereupon a jury was empaneled and sworn, and the cause was tried upon the merits by both parties, and a verdict rendered by the jury in favor of the plaintiffs for ten thousand dollars damages.

Upon appeal from such judgment by the United States, the supreme court of Wisconsin affirmed the judgment.

Jones *vs.* United States, 48 Wis., 385.

Points of the Defendants in Error.

The points relied on for an affirmance of the judgment, are as follows:

1. That the acts of the Legislature of Wisconsin invested the State courts with full and appropriate jurisdiction suited to the nature of the case, both as to the subject-matter thereof and the parties thereto.

2. That Congress, recognizing the jurisdiction of the State court, adopted the mode provided by the laws of the State for the ascertainment of flowage damages, submitted to such court for adjudication the rights and liabilities of the Government in respect to lands taken by flowage, and thereby waived its exemption from suit.

3. That the direction to the Department of Justice to represent the United States in legal proceedings under the act and for flowage damages, shows that where lands were to be condemned for canals, cut-offs, &c., the Government was to be the actor; and for lands already taken, a defendant, according to the railroad act of the State. This direction to, or appointment of, the Department of Justice is in harmony with the preceding part of the act, and renders its meaning clear. Standing alone, it authorized the Department of Justice to appear in and submit the Government like a person when suitor to the jurisdiction of any Federal or State court.

4th. Independent of the Congressional statute, the mere rule of law exempting the sovereign from suit, should yield to the constitutional provision that private property shall not be taken for public use without just compensation.

5th. That immunity from suit does not come from the Constitution or any law of Congress, but from the general law, and is, therefore, not a Federal question.

6th. That the act of Congress determined for the Government the necessity for taking the land flooded by the dam, that the use was for a public benefit, and the right of the owners to compensation; thus disposing of the political question in the exercise of the right of eminent domain, and leaving to the court the mere incident to the taking to be passed upon, viz., the amount of compensation to be made for the property taken.

7th. That if the exercise of eminent domain is a constitutional right, that right has not been denied by the State court; but, on the contrary, the exercise of the right has been permitted, and sanctioned, which is not error.

8th. That the opinion of officer in charge in regard to the prudence of lowering the dam, contemplated in chapter 166, means an opinion acted upon and carried into effect by an actual lowering of the dam, and not a mere formal opinion, without action on his part or that of the head of the proper department.

9th. That the act of Congress is not in violation of Section 2 of Article 3 of the Constitution.

10th. That all Federal questions were rightly decided by the State Court.

In view of the concessions of the learned Solicitor General, I shall discuss all of the above points under one head, except the 9th and 10th.

The first point made is not questioned, and I pass to the second one stated.

The improvement producing the injury was originally authorized by or consented to by the United States, certain rights therein being reserved and held by the Government during all the time from its inception to its surrender, within the time mentioned in the act of Congress for its completion, with a contingent or reversionary interest in the land grant; it was purchased or surrendered back at what it would cost to build the works anew, deducting a reasonable sum for depreciation by wear and tear, and from the sum paid was deducted the amount realized from the land grant which had been applied in the construction and maintenance of the improvement works, including the Menasha dam.

For a number of years prior to the transfer to the United States, and during all the time since, to the present time, the lands of defendants in error have been overflowed and injured by means of said Menasha dam.

The United States has since the transfer been in possession of and maintained said dam, at the same height, permitted work to be done upon it without objection, collected tolls for the passage through the improvement, and made appropriations annually for the maintaining and carrying on the works of improvement. It omitted and delayed to institute proceedings to ascertain the compensation due the owners.

From the history of this improvement, from the beginning to the end, its origin and progress, the terms of transfer and by the mere fact of the transfer alone, it appears that the defendants in error are equitably entitled to compensation from the Government for the damages which they have sustained, and it remains to be discussed whether an adequate legal remedy has been provided for the ascertainment of such compensation.

Preliminary to the consideration of the object and intent of the acts of Congress and of the Legislature, generally understood and believed as designed to afford a remedy in cases like the one at bar, it is important, in view of the objection taken by the Government counsel at the commencement of the trial in the State court, to consider the state of the law before the passage of those acts now to be passed upon and construed, not that they are obscure, ambiguous, or doubtful, but discerning the mischiefs and defects to be removed, the true reason of the remedy is made more apparent.

Although the property of the claimants had been taken, yet prior to the act of 1875 they were wholly without redress to obtain compensation. Following the rule of the common and civil law, that the sovereign is not liable to an action by a subject, except upon consent given by the sovereign, it is held in this country that a State or the Government of the United States is not liable to be sued, except by its own consent, given by law.

United States *vs.* McLemore, 4 How., 286.
Hill *vs.* United States, 9 How., 386.

There was no statute authorizing or permitting the own-

ers to prosecute an action to recover for the injuries sustained in any court, either State or Federal; the judiciary acts of 1789 and 1875, conferred upon the district and circuit courts of the United States jurisdiction concurrent with the State court of actions, in which the United States *are plaintiffs or petitioners.*

But no provision is anywhere found which authorizes an action to be brought *against* the United States for the taking of property or the violation of the rights of property, or indeed for any other act injurious to the citizen. A limited class of claims, in which this does not fall, may be referred to the Court of Claims for examination; as to most mattes relative to property and some other subjects, the Government is wholly irresponsible, above the law, for acts which, as between individuals, remedies are afforded, and beyond the reach of the process of any court, unless Congress otherwise provides.

United States *vs.* Eckford, 6 Wall., 484.
Langford *vs.* United States, 104 U. S., 341.

Upon this subject the Court, in Brown *vs.* the United States, 6 Court of Claims, Rep. 171 say: "The laws of other nations have been produced and proved in this court and the mortifying fact is judicially established that the Government of the United States holds itself, of nearly all governments, the least amenable to the law."

Mr. Justice Story, in his Commentaries on the Constitution, (2 Story's Const., Sec. 1678,) says:

"Surely it can afford no pleasant source of reflection to an American citizen, proud of his rights and privileges, that in a monarchy the judiciary is clothed with ample

powers to give redress to the humblest subject in a matter of private contract, or property, against the crown, and that in a republic there is an utter denial of justice in such cases through the instrumentality of any judicial process. He may complaim, but he cannot compel a hearing. The republic enjoys a despotic sovereignty to act or refuse as it may please, and is placed beyond the reach of law. The monarch bows to the law and is compelled to yield his prerogative at the footstool of justice."

This is, perhaps, a harsh and unjust criticism upon our system of government, and an unwarranted reflection upon the wisdom of the legislative department, for Congress, unless expressly prohibited by the Constitution, can and usually does afford redress to the citizen for acts of the Government which deprive him of his property or impose upon him more than his just share of the public burden.

The defendants in error, at the time of the passage of the act of 1875, could not maintain trespass against the Government for the injuries to their property. They could not maintain ejectment to recover possession of their land. There was no power in the courts to dispossess the United States, and no lawful power to compel the abatement of the dam, causing the destruction and damage to their property; equity could give no relief to remove the dam, restore their property, or give them compensation for it.

Where Congress, in the exercise of lawful authority, has inaugurated and adopted this system of improvement, and is appropriating public moneys to maintain and carry it out, neither the courts nor any officer have authority to forbid its completion, or to undo what has been done; that is, remove or lower the dams.

Wisconsin *vs.* Duluth, 96 U. S. Rep., 379.

Congress only had power to recognize their claim, and others, to compensation for this injury, and to provide that the amount of damages which they ought to have of the United States might be ascertained by a particular mode or procedure. It is not essential that the forum chosen should be the Federal courts. Congress has unquestioned power to refer any dispute between the Government and one of its citizens to any officer of the departments for adjustment and settlement or to a commission, or board of arbitrators, for their decision, and the award or finding would as effectually and conclusively bind the United States as a party as it would the adverse party, or as individuals or corporations would be bound by similar proceedings.

United States *vs.* Ritchie, 17 How., 525.
Kohl *vs.* United States, 91 U. S., 367.

The United States does not occupy a different or superior position in respect to being submitted and made a party to legal proceedings than does a State. Within their respective spheres both are sovereignties, with certain enumerated powers, and equally exempt from suits except by legislative consent. That the legislature on behalf of the State, unless forbidden by the constitution, may submit controversies between the State and any of its citizens to arbitration, or to the courts, so as to confer jurisdiction of the State as a party to the proceedings, or action, cannot be seriously questioned.

In Clark *vs.* Barnard, (2 S. C. Rep., 878, July, 1883,) Mr. Justice Matthews says:

"The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits

of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction, while, of course, those courts are always open to it as a suitor in controversies between it and citizens of another State. In the present case the State of Rhode Island appeared in the cause, and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as a defendant."

Hall *vs.* Wisconsin, 103 U. S., 5.

Not only may the Legislature of a State consent that it may be sued, but it may waive any right or advantage which the State has secured by a judgment already rendered.

Calkins *vs.* The State, 21 Wis., 501.

The same principle is applicable to the United States. Congress, on behalf of the Government, may consent that it may be sued and may submit it, as a party, in any controversy to the decision of any officer, board, or commission, or to the jurisdiction of any court, so that it will be bound by the decision or judgment. An example is found in this case where the United States, by consent of Congress, joined with the canal company in the appointment of arbitrators to determine the consideration to be paid for the improvement.

To Congress is committed the prerogative of determining the question for the Government, what in law, equity, good conscience, or by way of grace, ought to be done for the individual whose property has been taken or invaded by the

Government, and in what manner and by what instrumentalites the amount for which reparation ought to be made, shall be ascertained. It can determine the amount for itself and make immediate payment, or take the decision of any tribunal to which it may submit the rights of the Government as to its liability, and the extent of such liability. Although the payment of the judgment is dependent upon legislative will, that does not affect its regularity or validity when considered by the courts. The judgment is for the information of the governing body of the nation.

As it was said in United States *vs.* Lee, 106 U. S., 196, in speaking of the immunity of the Government in the absence of legislative action:

"It is difficult to see on what solid foundation the exemption from liability to suit rests." * * *

"The objection is also inconsistent with the principle involved in the last two clauses of Article 5 of the Amendments of the Constitution, whose language is: 'That no person shall be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use without just compensation.'

"Undoubtedly those provisions of the Constitution are of that character which it is intended the courts shall enforce when cases involving their operation and effect are brought before them."

Chief Justice Robertson, in Dickey *vs.* Turnpike Co., 7 Dana, 113, says:

"Any person whose property shall thus be taken or used for public benefit may lawfully demand just compensation for the property or the use of it; the Federal Constitution expressly secures it to him by interdicting the appropriation

of private property to public use without the owner's consent or just compensation."

Again he declares:

"The national power to use the land of a citizen of a State for an armory or a fortification is undoubted and irresistible. The constitutional obligation to pay the owner a just equivalent, if it be demanded, is equally undoubted and inevitable."

Whatever may be the reason for the rule, and irrespective of whether it shall override a positive provision of the fundamental law designed for the protection of life and property, certainly the Constitution has empowered Congress in its discretion, as the officer of the sovereign, to provide that the citizen having proper grounds for a suit against such sovereign, shall be heard in a court of justice, and to bring or send that sovereign into court to answer unto the citizen in a suit at law or in equity.

The power of Congress to establish courts or to confer jurisdiction upon courts, is not involved in the question of the power to consent that the United States may be sued in a court of law, where the court has the jurisdiction of the subject-matter but not of the person of the defendant without such consent.

"It is competent for the United States to sue any of its debtors in a court of law. It is equally clear that the United States may consent to be sued, and may yield this consent upon such terms and under such restrictions as it may think just. Though both the marshal and the Government are exempt from suit, for anything done by the former in obedience to legal process, still Congress may provide by law that both or either shall, in a particular class of cases, and under such restrictions as they may think proper to impose,

come into a court of law or equity, and abide by its determination. The United States may thus place the Government upon the same ground which is occupied by private persons who proceed to take extra judicial remedies for their wrongs, and they may do so to such extent and with such restrictions as may be thought fit."

Murray's Lessee *vs.* Hoboken Land and Improvement Co., 17 How., 272, p. 283, 4.
Beers *vs.* Arkansas, 20 How., 527.

Section 2, of chapter 291, Laws of 1874, had plainly and distinctly provided, that in case lands have been overflowed, or injured, or taken, or it shall be found necessary or proper to overflow, injure, or take the lands of any person for, or by reason of this work of the United States Government, the compensation for damages sustained by the owner or owners of the land overflowed, injured, or taken, might be ascertained, determined, and paid in the same manner as prescribed in chapter 119, of the Laws of 1872, relating to railroad companies, and that all the provisions of said act might apply in the case of the overflowing, injury, or taking of lands by the United States Government, which are properly applicable thereto.

This was the "mode provided by the laws of the State wherein such property lies," and there was no other mode whatever provided by the laws of this State, or by any law. It was the sole and exclusive mode of procedure for the ascertainment and determination of compensation for damages for lands overflowed, injured, or taken by reason of this work of the United States.

With these laws of the State in view and in force, Congress, on behalf of the United States, by the act of March 3,

1875, consented that compensation for damages for lands overflowed, injured, or taken by reason of said works of improvement, might be ascertained pursuant to those laws of the State, and submitted the United States as a party to the statutory proceeding under chapter 119 of 1872, and permitted the Government to be called into court and made a defendant, like an individual or corporation, upon the petition of an owner whose lands had been overflowed, injured, or taken by means of said improvement, and appointed the Department of Justice as the attorney to represent the interests of the United States in such proceeding.

It was an absolute and perfect submission and consent of the United States to the institution of these proceedings, and a waiver of its exemption as a sovereign from suits, at the instance of the defendants in error and others, for damages sustained by reason of the works of the Government specified in the act of Congress. Such is the plain intent of the act. To hold otherwise would be to render the statute a nullity, which interpretation cannot be admitted.

Sedgwick on Statutory and Const. Law, 233.

The object to be attained, and the means to be employed, are contained in and pointed out by the statute, and are so specifically and certainly stated that no necessity exists for invoking rules of interpretation to discover the legislative intent. Either it is in plain language a means for obtaining redress for injuries to property by the Government, or else worse than a nullity, a delusion, and a snare, provided by Congress for the very persons whose lands are taken and held without compensation. The latter motive cannot be

imputed to a solemn act of Congress; but, on the contrary, the statute upon all authority, must be so construed as to give it effective operation, according to the intention with which it was passed.

In U. S. *vs.* Temple, 105 U. S., 97, upon the construction of statutes, Mr. Justice Wood says:

"Our duty is to read the statute according to the natural and obvious import of the language, without resorting to subtle or forced construction for the purpose of either limiting or extending its operation."

The quotation from Vattel, in the opinion in Ruggles *vs.* Illinois, 2 S. C. Rep., 832, (June, 1883,) is applicable to the interpretation of the act of Congress:

"When a deed is worded in clear and precise terms—when its meaning is evident, and leads to no absurd conclusion—there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it."

The courts cannot treat statutes as *colorable only*, but will hold all statutes to have been framed and passed in good faith.

"It would be a palpable violation of judicial duty and propriety, to seek in a statute a construction in conflict with the Constitution, or with the object of its enactment, or to admit such construction, when the statute is fairly susceptible of another, in accord with the Constitution and the legislative intention."

State of Wis. *vs.* City of Eau Claire, 40 Wis., 533.
Cooley's Const. Limitations, 182 to 187.

The right of the United States to bring actions in courts of common law origin, or those established by the laws of the several States, has been exercised and affirmed in numerous cases, and no reason is perceived why the Government may not be made a defendant in the same forum where it may go as a plaintiff or petitioner.

In the present case it is a formal and immaterial matter whether the United States, or the owner files the petition, asking for the appointment of the commissioners of appraisal, for in either case the United States is the real defendant, and under sec. 17, ch. 119, of the Railroad Act, upon an appeal to the circuit court, would be so entered of record. The owners are according to the usual proceeding at law, the acting party, and assume the burden of proving the damages sought to be recovered.

If any doubt can arise from the language of the statute as to its intent and the remedy to be pursued, the practical construction given to it by the Attorney General of the United States, acted upon by all persons affected by the improvement, adopted, and followed by the legal profession, is decisive of the question.

Sedgwick St. Cons. Law, 227, and cases cited.
Harrington *vs.* Smith, 28 Wis., 43.

Mr. Attorney General Pierrepont in his opinion to counsel for the Government in the State court, while this and other cases were there pending, says, in reference to chapter 166:

"The reference in that act to 'the mode provided by the laws of the state' undoubtedly points to the mode provided by the acts of the Legislature of Wisconsin, of March 12,

1874, chapter 291, and March 22, 1872, chapter 119, and the proceedings authorized by these acts all are none other than proceedings to ascertain and determine the compensation to which the owner of lands are entitled for a *legal taking* or *appropriation thereof* for public purposes. Accordingly, the only compensation which Congress could have had in view, is *compensation for private property taken or appropriated* in the manner above described, (*i. e.* by the flowage of the same by means of the works of said improvement,) *for which the United States were then legally liable;* the mode selected by that body being adapted to the ascertainment of such compensation solely."

Appendix to Brief.

In speaking of the mode of acquiring land under the act, Hon. S. F. Phillips, Acting Attorney General, says:

"The method of acquiring land described by this act is clearly, not by bargain and sale, or purchase directly from the owner, where the value or price is determined by agreement between the parties. Thus the value of the property which the officers are authorized to pay for and take possession of must have been ascertained in the mode provided by the laws of the State; meaning, unquestionably, the mode established by the local laws for the valuation of property where it is sought to be acquired for public purposes under the right of eminent domain; in other words, where condemnation proceedings are instituted. The method of acquisition contemplated in the act, seems, then, to be by proceedings of that character, and I think it does not authorize a resort to any other."

15 Opinions Attorneys General, 31.

Mr. Chief Justice Waite, says in United State *vs.* Pugh, 99 U. S., 265, that: "It is a familiar rule of interpretation that in the case of a doubtful or ambiguous law, the con-

temporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

Edwards *vs.* Darby, 12 Wheat., 210.
Hahn *vs.* U. S., 2 S. C. Rep., 494, May, 1883.

The act should be construed to effect the clear intention of Congress to provide a remedy for the owners of the land appropriated to public use.

Roberts *vs.* United States, 92 U. S., 41, p. 49.

The payment of the commissioners by the United States, for their services in this and other similar cases, is legislative interpretation, if any was necessary, of the act of 1875, and acknowledgment of the correctness of the proceedings, and a ratification of the acts of the commissioners.

Wells *vs.* Nickels, 104 U. S., 444.

The authority of the Department of Justice to represent the interest of the United States in these proceedings adds force to the position we take, and vested in that department the power to submit the Government to the jurisdiction of any forum competent to try such cases.

Florida *vs.* Georgia, 17 How., 478.

In Carr *vs.* U. S., 98 U. S., 433, had the Secretary of the Treasury been authorized to employ counsel to represent the interests of the Government in the ejectment cases in the State court, it would have been held, I think, that the Government was estopped by the judgments of the State court.

It is held in U. S. *vs.* Neustra Senora de Regla that the executive department of the Government, in the absence of

legislative authority, had the power to submit the United States to the jurisdiction of a court as a defendant.

2 S. C. Reps., 287, April, 1883.

The statutes of the State and the act of Congress are to be taken together in reference to the ascertainment of compensation for damages occasioned to lands by the works of the United States. Those of the State conferring jurisdic- over the subject-matter, and of the parties and that of Congress, as a consent to and submission of the United States as a party to that jurisdiction, and a waiver of any right to object to proceeding in conformity with the State laws.

Where he is a defendant, a foreign sovereign stands on the same footing with ordinary suitors as to the rules and practice of the court.

Columbian Government *vs.* Rothschild, 1 Sim., 94.

United States *vs.* Wagner, 2 L. R., ch. 582; 35 L. J. Chanc., 624.

EMINENT DOMAIN.

On this point I contend that the legislative branch of the Government, by the statute, has decided that the United States needs to flood our lands for a public use, and that the court has nothing to do with that question. It is settled and not open to inquiry. The exercise of the right of eminent domain for the Government has been made by Congress.

Suppose the United States did not own the land upon which the post office building in Milwaukee is situated, Congress passes a statute that compensation to be paid to the owner may be ascertained in the mode provided by the

laws of the State. The Government, by this act, exercises its sovereign right of eminent domain, leaving only the incident of compensation to the courts.

Among the powers given to railroad companies by sec. 11, ch. 119, of 1872, Laws of Wisconsin, was, by subdivision 4, "to lay out its road not exceeding one hundred feet in width, and to construct the same," upon making compensation therefor.

Speaking of this statute, the court of Wisconsin, in Wis. Central R'y *vs.* Cornell University, 52 Wis., 537, hold that the Legislature determined the necessity of taking 100 feet for right of way, and say:

"As to the 100 feet, the Legislature have obviated proof of the necessity, or, rather, have furnished a conclusive presumption of it, by a legislative *fiat.*"

Congress compels us to sell our lands and accept compensation.

The effect of the right of eminent domain against individuals amounts to nothing more than a power to oblige him to sell and convey when the public necessities require it.

Fletcher *vs.* Peck, 6 Cranch, 145.

This action is not a proceeding for the exercise of the right of eminent domain, but for the compensation for land taken where all the essential elements of eminent domain ~~remain~~, have been actually exercised and accomplished so far as the United States is concerned. The right of eminent domain is given for the purpose of obtaining the control and possession or ownership of property for public use. That is the sole object of the condemning party. In this case the owner's land has been taken and appropriated, in the

physical sense of the word, by a superior power. They have been dispossessed, and their right of control over the land displaced by the Government; the only right remaining to them being the legal title, to be vested in the Government or its possession made lawful, by making compensation in damages.

Sedgwick St. and Const. Law, 455 and 6.
Cooley Const. Lim., 524.

The necessity of the taking, and that such taking is for a public use, are settled by the statutes, providing for compensation and the actual occupation of the land and the exclusion of the owners therefrom by the Government, precludes all inquiry into the necessity of the taking, or that the use is not public unless the owner chooses to raise it. The constitutional guaranties are for his protection, which he may waive by accepting compensation or taking steps to have such compensation ascertained, but the party who takes the property will not be heard to say that there was no necessity for it, or that prior proceedings were irregular to defeat compensation.

Higgins *vs.* Chicago 18, Ill., 276.
Chicago *vs.* Wheeler, 25 Ill., 478
Baker *vs.* Braman, 6 Hill, 47.
Ewbury *vs.* Conner, 3 Comst., 511.
Sherman *vs.* McKeon, 38 N. Y., 266.

On the hearing before the commissioners and on the appeal from their award, the contest is only as to what amount of compensation the owner shall receive for his land and

damages thereto. No other question can be tried, and all other questions not relating to that subject are waived.

Miller *vs.* P. & McG. R. R. Co., 34 Wis., 633.
Stringham *vs.* Oshkosh & Miss. R. R. Co., 33 Wis., 471.
Burns *vs.* Mil. & Miss. R. R. Co., 9 Wis., 450.
Ney *vs.* Swinney, 36 Ind., 454, p. 460.
M. & M. R. R. Co. *vs.* Rosseau, 8 Iowa, 373.
Matter of N. Y. C. R. R. Co., 56 N. Y., 407.
Moore *vs.* Ry. Co., 34 Wis., 173.
Warren *vs.* Ry. Co., 6 Biss., 425.
Harner *vs.* Ry. Co., 37 Pa. St., 333.
Pippe *vs.* Ry. Co., 23 Minn., 18.

The United States having appealed from the award to the circuit court, consented to a trial in that court, and that the issue should be confined to that of compensation only. Having contested on that ground, given in evidence all it could to defeat our case, being heard by its duly appointed attorney, and being beaten in the contest, it cannot now allege that all this while it was merely experimenting, and that its own appeal was void.

Delaware R. R. Co. *vs.* Burson, 61 Penn. St., 369.
United States of America *vs.* Reed, 56 Mo., 565.

While claiming the proceeding in this action is for the ascertainment of compensation only, and that it does not involve the question of the exercise of the right of eminent domain, still there is no valid objection to the United States acquiring the title to property for public uses by proceedings in the State courts in the mode provided by the State laws. It is not the condemning by one sovereignty in its own name so as to become the owner for the purpose of

turning it over to another sovereignty for the public use of the latter.

The proceedings in State courts in the name of the United States, or of its officers on its behalf, to condemn property for forts, light-houses, and public buildings, have been upheld in numerous cases, and where the proceeding is to obtain compensation for property already seized and held by the Government for a public use, in accordance with the acts of the State Legislature expressly provided for that purpose, and in the absence of any other remedy, such statutes shall be liberally construed to advance and effectuate the intention of the Legislature and not adjudged invalid unless they are clearly, unmistakably, and beyond doubt in conflict with the Constitution.

7 Op. Attys. Genl., 114.
Reddal *vs.* Bryan, 14 Md., 444.
Harris *vs.* Elliott, 10 Pet., 25.
United States *vs.* Reed, 56 Mo., 565.
Gilmer *vs.* Lime Point, 18 Cal., 229.
Burt *vs.* Merchants Insurance Co., 106 Mass., 356.
Orr *vs.* Quimby, 54 N. H., 590.
United States *vs.* Ry. Co., 1 Minn., 127.
League Island, 1 Brewst., (Pa.,) 524.
Duhe *vs.* Navigation Co., 10 Ala., 82.
Reddal *vs.* Bryan, 24 How., 420.
Kohl *vs.* United States, 91 U. S., 367.

The Federal courts have jurisdiction to try the questions incident to the right of eminent domain in the States, and no solid grounds exist for holding that the compensation to be paid by the Federal Government for land appropriated to its use may not be ascertained by the State tribunals, as

it in no sense limits or denies the sovereignty of the National Government.

This question is settled by this Court in Boom Co. *vs.* Patterson, 98 U. S., 407.

In that case the plaintiff, a corporation created by the laws of Minnesota, instituted proceedings to condemn lands situate in that State for boom purposes, as it was authorized to do by the laws of Minnesota. The owner of the land was a citizen of the State of Illinois. After an appeal from the award of the Commissioners, appraising the value of the land to the district court of the State, the defendant secured a removal to the circuit court of the United States. Objection to the jurisdiction of the circuit court was taken by the plaintiff.

The court say:

"The position of the company on this head of jurisdiction is this: that the proceeding to take private property for public use is an exercise by the State of its sovereign right of eminent domain, and with its exercise the United States, a separate sovereignty, has no right to interfere by any of its departments. This position is undoubtedly a sound one, so far as the act of appropriating the property is concerned. The right of eminent domain, that is, the right to take private property for public use, appertains to every independent government. It requires no constitutional recognition; it is an attribute of sovereignty.

"The clause found in the constitutions of the several States providing for just compensation for property taken is a a mere limitation upon the exercise of the right.

"When the use is public, the necessity or expediency of appropriating any particular property is not a subject of judicial cognizance. The property may be appropriated by an act of the legislature, or the power of appropriating it

may be delegated to private corporations, to be exercised by them in the execution of works in which the public is interested. But notwithstanding the right is one that appertains to sovereignty, when the sovereign power attaches conditions to its exercise, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance. If that inquiry take the form of a proceeding before the courts between the parties—the owners of the land on the one side, and the company seeking the appropriation on the other—there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State.

"The proceeding in the present case before the commissioners to appraise the land was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms. But when it was transferred to the district court by appeal from the award of the commisioners, it took under the statute of the State the form of a suit at law, and was thenceforth subject to its ordinary rules and incidents. The point in issue was the compensation to be made to the owner of the land—in other words, the value of the property taken. No other question was open to contestation in the district court. (Turner *vs.* Halloran, 11 Minn., 253.) The case would have been in no essential particular different had the State authorized the company by statute to appropriate the particular property in question, and the owners to bring suit against the company in the courts of law for its value.

"That a suit of that kind could be transferred from the State to the Federal Court, if the controversy were between the company and the citizen of another State, cannot be doubted. And we perceive no reason against the transfer of the pending case that might not be offered against the transfer of the case supposed."

The act of Congress does not and was not intended to make the affirmative opinion of this officer, that it is not prudent that the dam be lowered, a prerequisite to jurisdiction, or the institution of proceedings to ascertain the compensation, nor that his opinion, given on the trial, that it is prudent that the dam be lowered, should work an abatement of the action. This officer was not empowered by the act to lower the dams, or make any change in the improvement. He was the mere agent of the Government, without specific instructions from his principal, except, perhaps, that he should assume charge of the works, and might give his opinion and make recommendations in reference to any changes in such works, for the information or guidance of his superior officers, and by them transmitted to Congress to enable that body to pass such laws upon the continuance and maintenance of this improvement, or for changes therein as might be considered necessary or advisable.

The dam was the property of the Government, and it would have been a gross breach of duty, if not a criminal act, for the officer in charge to have destroyed the value of the improvement and the property of the United States, by tearing out the dam or by materially lowering it. He was invested with no such authority, as he well understood, and did not assume it, as he made his recommendations to his superior officer, the Chief of Engineers, who transmitted the same to the Secretary of War, but no directions were received from any source to lower the dam.

The most favorable construction of the clause for the defendant is, that the officer in charge being of the opinion that it is prudent to lower the dam, and that opinion being

communicated to the Secretary of War or to Congress, and authority is given to lower or remove the dam, and such dam is actually lowered or removed to the extent that the flowage thereby occasioned shall cease, then the United States will not be legally liable for damages after such lowering or removal of the dam. Thus furnishing a mode for the Government to abandon the right to take lands by flowage. The election, however, to abandon the flowing by the abatement of the dam should be exercised before judgment.

The dam has not been lowered. No steps have been taken to lower it. No directions have been given to lower it, and no intention manifested by the Government or any of its authorized agents, that it is to be lowered. On the contrary, the peremptory mandate has gone forth, every year, from the body who is authorized to speak for the Government that the improvement, including this dam, shall be maintained, and every subordinate officer must obey that mandate, whatever may be his opinion. Since 1872, Congress has annually made appropriations "*for the repair, preservation, construction and completion*" of the works of the improvement, but not one word of legislation for the lowering or abatement of the dam, which has and is causing so great damage. Such legislation is made advisedly and with full knowledge of all the facts relating to the subject.

The chief officers of the Government, the Secretary of War and Attorney General, as shown in this case, were long since fully advised of the damage done by the improvement, and of the claims made for compensation, and the presumption is that the United States, by its proper officers, have knowledge of the litigation to which they are a party.

The subsequent legislation of Congress to carry on the

work of continuing and completing the improvement is a repeal or modification by necessary implication of the power or discretion in any officer, under the act of 1875, to lower the dams.

Wisconsin *vs.* Duluth, 96 U. S., 379.

It was not intended to leave the rights of the owners so absolutely to the mercy of the mere opinion of the officer.

Moore *vs.* Boston, 8 Cush., 274.

That a statute should be so interpreted as to give some force and effect to all parts, and make them all harmonize to carry out the object the legislature had in view, is a cardinal rule of construction. The construction above contended for would give harmonious effect to all parts of this statute.

With these observations we leave this point and rest it upon the just and reasonable construction given this clause by the learned counsel for the plaintiff in error, and on the opinion of the court below.

Chapter 166, *of* 1875, *is not in conflict with Section* 2 *of Article* 3 *of the Constitution.*

The Constitution does not in terms make the jurisdiction of the national courts exclusive over controversies to which the United States are a party, nor is there any law of Congress vesting exclusive jurisdiction in such cases in the Federal courts; and, even if there was such a law, it is within the power of Congress to make exceptions applicable to particular controversies to which the United States may become a party.

So far as the Constitution apportions powers to the na-

tional judiciary, it must be understood, for the most part, as simply authorizing Congress to confer jurisdiction to exercise those powers, and not as directly conferring them upon the courts. The Constitution does not of its own force give to the National courts jurisdiction of the several cases which it enumerates; but an act of Congress is essential to create courts and to apportion the jurisdiction among them. The exceptions are of those few cases of which the Constitution confers jurisdiction upon the Supreme Court by name.

Cooley's Const. Limitations, 19.

No attempt will be made to review the numerous decisions upon this article of the Constitution and the power of Congress under it. The interpretation given to section 2, by Justice Story, in Martin *vs.* Hunter's Lessee, followed, so far as our research has extended, by the courts since that case was decided, does not vest exclusive jurisdiction of cases to which the United States are a party, in the Federal courts, nor forbid jurisdiction of those cases to the State courts. He says:

"It will be observed that there are two classes of cases enumerated in the constitution, between which a distinction seems to be drawn. The first class includes cases arising under the constitution, laws, and treaties of the United States; cases affecting ambassadors, other public ministers, and consuls; and cases of admirality and maritime jurisdiction. In this class the expression is, and that the judicial power shall extend to *all cases;* but in the subsequent part of the clause, which embraces all other cases of national cognizance, and forms the second class the word "*all*" is dropped, seemingly *ex industria.* Here the judicial authority is extended to controversies, not to *all* controversies, to which the United States shall be a party, etc. From

this difference of phraseology, perhaps a difference of constitutional intention, may with propriety be inferred. It is hardly to be presumed that the variation in the language could have been accidental. It must have been the result of some determinate reason; and it is not very difficult to find a reason sufficient to support the apparent change of intention.

In respect to the first class, it may well have been the intention of the framers of the Constitution imperatively to extend the judicial power, either in an original or appellant form, to all cases; and in the latter class to leave it to Congress to qualify the jurisdiction, original or appellate, in such manner as public policy might dictate."

Martin *vs.* Hunter's Lessee, 1 Wheat., 304.

The most that has been, or can be claimed is, that the judicial power of the United States is only exclusive of all State authority in the first class of cases, and in all others can only be made so at the election of Congress. In the latter class the States may legislate, establish courts, confer jurisdiction upon them in the absence of Congressional regulations. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the power by the States.

Sturges *vs.* Crowninshield, 4 Wheat., 193.
Houston *vs.* Moore, 5 Wheat., 1.
Delafield *vs.* State of Illinois, 2 Hill, 159.
S. C., 26 Wend., 192.

The only controversies to which the United States are a party, over which a State court would have no jurisdiction, would be cases in law or equity, arising under the Constitution, laws, and treaties of the United States, and cases of admirality and maritime jurisdiction; and in all such cases,

jurisdiction is forbidden to the State courts by vesting in the Federal courts exclusive jurisdiction of the *subject-matter* of the suits, and not by the fact that the United States is a party. It is want of jurisdiction over the subject-matter of the action, not want of jurisdiction over the parties, which makes the distinction in case of ambassadors, ministers, consuls; and in some cases of States, jurisdiction over the person is withheld, whatever may be the subject-matter of the suit. But, aside from the cases mentioned, and in the absence of Congressional exclusion, where State courts have jurisdiction under the State laws of the subject-matter of the action, and can acquire jurisdiction of the parties, the mere fact that one of the parties is the United States, does not oust the court of jurisdiction. The Constitution no more makes the Federal judiciary exclusive of all suits to which the United States are a party, than it does of all suits to which citizens of different States may be parties. They are of the same class. No one can, for a moment, maintain that the Constitution, of its own force, excludes the jurisdiction of the State courts over the person in suits between citizens of different States, or between citizens of the same State, claiming lands under grants of different States, or that it vests such jurisdiction exclusively in courts created by Congress. The United States has no different or higher constitutional right to object to the jurisdiction of the court, where the subject-matter is the same, than an individual suitor. The only superiority of the Government, not derived from the Constitution, is its exemption by virtue of its sovereignty from suits without its consent. That want of consent goes to the right of action, and excludes the jurisdiction of all courts, State and Federal.

The question, whether such consent shall be given, is not one of constitutional power or construction, but one of public policy or convenience as to whether the Government shall be permitted to be brought into any court as a defendant. When that consent is given, it stands as an individual, and subject to the same rule as to jurisdiction of the person and mode of procedure.

Congress has prescribed regulations in regard to the jurisdiction of suits between citizens of different States, not vesting it exclusively in the Federal courts, but authorizing or permitting concurrent jurisdiction to the State courts.

Jurisdiction, originally or by removal from the State courts to the United States courts, can only be obtained by a strict compliance at the time and in the manner provided by the laws of Congress. The conclusion from the authorities is, that as to all subjects and persons, except those mentioned above, which Congress has not made exclusively of Federal cognizance, remain subject to the jurisdiction of State courts.

The opinion of the Court in Clafflin *vs.* Houseman, 93 U. S., 130, by Mr. Justice Bradley, so clearly meets this point that I quote at length from it: It is held to be a general principle:

"That where jurisdiction may be conferred on the United States courts, it may be made exclusive where not so by the Constitution itself; but if exclusive jurisdiction be neither express nor implied, the State courts have concurrent jnrisdiction whenever, by their own constitution, they are competent to take it. Thus, the United States itself may sue in the States courts, and often does so.

"The laws of the United States are laws in the several States, and just as much binding on the citizens and courts

thereof as the State laws. The United States is not a foreign sovereignty as regards the several States, but is concurrent and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State, concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights, acquired under either system of laws, may be enforced in any court of either sovereignty, competent to hear and determine such kind of of rights and not restrained by its constitution in the exercise of such jurisdiction. Thus a legal or equitable right acquired under State laws, may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So, rights whether legal or equitable, acquired under the laws of the United States, may be prosecuted in the United States courts, or in the State courts competent to decide rights of the like character and class; subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction.

"This jurisdiction is sometimes exclusive by express enactment and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not otherwise provided by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State as it is to recognize the State laws. The two together form one system of jurisprudence, which constitute the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same

country, having jurisdiction partly different and partly concurrent."

"Where the power is extended" to "controversies" of a certain class, as "controversies to which the United States is a party," &c., "the jurisdiction of the Federal courts is not necessarily exclusive."

Davis *vs.* Friedlander, 104 U. S., 570.

The act of 1875 does not establish the State court, nor confer upon it jurisdiction to ascertain compensation for damages produced by this improvement. The court was already established with full power to try all questions relating thereto which might arise. Congress consents to the United States being brought into that court as a defendant, and by lawful authority appoints an attorney to represent its interests. Doubtless Congress could have designated the Federal court as the forum, or as one of the terms of its consent, provided for a removal of these causes from the State to the United States court, but it has done so, and must abide by the determination of the State court. In case it was perceived that from local prejudices or other causes, injustice was likely to be done, it could withdraw its consent at any time. As that has not been done, it is fair to presume that no injustice or wrong is anticipated.

"Proper respect for a co-ordinate branch of the Government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of a constitutional authority to pass the act in question is clearly demonstrated."

United States *vs.* Harris, 106 U. S., 629.

The Federal Questions were Correctly Decided in the State Court.

No question of a Federal nature has been decided against the plaintiff in error. The Government has not been denied any right, privilege, or immunity, arising under the Constitution, laws, or treaties of the United States. The validity of the law of Congress has been admitted by the State court, the rights of the Government thereunder given full effect, and the act is not in violation of the Constitution. The Government is not compelled to take property it does not want, for Congress has determined all the elements essential to the appropriation of the property, except the judicial part of fixing the compensation.

If the right of eminent domain is in the case for consideration, and that right is of equal force and character with a right derived from the Constitution, so that the court on error to a State court has jurisdiction to review the question, I still contend no error was committed, for the reason that this right was not denied the Government, but enforced in its favor.

The title of the United States under these proceedings, upon making compensation, will be perfect, its right to flow the land described in the petition absolute and unassailable (Sec. 19, Ch. 119, Laws of 1872, of Wisconsin,) and it can have no reasonable ground of complaint, unless it be to paying the compensation awarded, which, of course, rests upon the will of Congress. The actual taking was accomplished many years ago, and it is designed by Congress that compensation shall follow in the mode provided by that body.

The law-making power of the nation, through its act, appropriated the particular property needed for the main-

tenance of the Government improvement, viz., all lands flooded by the dams of such improvement. The controlling question left for adjudication was that of damages only, conceded by counsel for the plaintiff in error not to be of a Federal nature. The contestation throughout the progress of the case has related to the subject of damages alone, and no other question was open to inquiry. It was a mere inquest to fix the value of property.

A trial in a Federal court would have been confined to the same issue, and upon the same proofs resulted in a similar judgment. The ground upon which the judgment rests is sufficiently broad to support it; and it does depend on the decision of a Federal right, either for against the Government, for its justice or validity.

The settled rule in this court is, that where the Federal questions are decided right in the court below, it will not look into the other errors assigned.

Murdoch *vs.* Memphis, 20 Wall., 590.
Bonaparte *vs.* Tax Court, 104 U. S., 592.

The same principle is applied in cases to which the United States is a party.

Mr. Chief Justice Waite says, in United States *vs.* Thompson, 93 U. S., 586, that—

"Judgments in the State courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties." * * * "It is not contended that this decision is repugnant to the Constitution or any law or treaty of the United States; but the argument is, that the check of McFreely & Hopper was not paid, it did not pay their debt. Whether this is so or not, does not depend upon any

The facts in relation to the purchase of the works and improvement by the United States appear to be these:

By the second section of the act of Juty 7, 1870, (16 Stat. 189,) the Secretary of War was authorized to ascertain the sum which ought in justice to be paid the Green Bay and Mississippi Canal Company, as an "equivalent for the transfer of all and singular its property, and rights of property, in and to the line of water communication between the Wisconsin river aforesaid, and the mouth of the Fox river, including its locks, dams, canals and franchises, or so much of the same as shall in the judgment of said secretary be needed;" and to that end he was authorized to join with the company in appointing a board of arbitrators.

It was also provided that the arbitrators in making their award, should take into consideration the amount of money realized from the sale of the lands theretofore granted by Congress, to aid in the construction of the improvement, which amount should be deducted from the actual value thereof, as found by the arbitrators.

Arbitrators were subsequently appointed by the Government and the company, who, after hearing and passing upon the allegations and proofs submitted, made their award in November, 1871. (Sec. Ex. Doc. No. 185, House of Rep., 42d Congress, 2d Sess.)

The arbitrators, as appears by their award, after considering the question of costs, etc., found the value of the property and rights of property of the Green Bay and Mississippi Canal Company in, and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals, and franchises, and including as fixtures attending the operation and repairs of the same, the dredge boats, dump scows, etc., to be $1,048,070, and that the amount of money realized from the sale of lands theretofore granted by Congress, to aid in the construction of said water communication, to be deducted from such value, was $723,070, leaving a balance of $325,000 to be paid to that company.

They then go on to say: "And whereas under the said act, the Secretary of War, may in his judgment, decide that such personal property may not be needed, and that a part of the franchises of the canal company, viz: the water powers created by the dams, and by the uses of the surplus waters, not required for the purposes of navigation, are not needed; and in order to enable said Secretary to pass judgment upon those questions, this board have thought proper to appraise the value thereof respectively; they estimate and appraise the value of such water powers and lots necessary to the enjoyment of the same, subject to all rights to use the water for all purposes of navigation, as the same is reserved in all leases made by said company, and subject also to all leases, grants, and assignments made by said company, at the sum of $140,000, which said sum is to be deducted from the said sum of $325,000, in case the said Secretary or Congress shall determine that the said water powers are not needed for public use; they also estimate and appraise the said dredge boats and other personal property mentioned, etc., at the sum of $40,000, which said sum is to be deducted from said sum of $325,000, in case the said Secretary or Congress shall decide that the same are not needed for public uses."

It may also be observed that during the hearing before the arbitrators two claims were presented as liens upon the improvement, one of which was considered by them not to be a lien, as it was already barred by the Statute of Limitations, but the other they held to be a lien upon the property, and decided that it should be paid "as a part of the said sum of $325,000 to be paid to the said canal company."

The Secretary of War having approved the award as made by the arbitrators, reported to Congress on the 8th of March, 1872, that $325,000 ought, in his opinion, to be paid to the said company as an equivalent for the transfer to the United States of all the property, rights, and franchises embraced in said award, provided Congress should determine

to purchase the whole thereof; but the Secretary was of opinion that the personal property appraised by the arbitrators at $40,000, together with the franchises appraised by the same at $140,000, were not needed; and deducting the two latter valuations, the value of the remaining property, franchises, etc., as found by the arbitrators, amounted to $145,000. The Secretary accordingly reported that this last sum was in his opinion a just equivalent for the transfer to the United States of so much of said property, franchises, etc., as was needed.

In the appropriation act of June 10th, 1872, chapter 416, Congress made the following provision:

"For payment to the Green Bay and Mississippi Canal Company, for so much of all and singular its property and rights of property in and to the line of water communication between the Wisconsin river and the mouth of the Fox river, including its locks, dams, canals, and franchises as were under the act of Congress, for the improvement of water communication between the Mississippi river and Lake Michigan by the Wisconsin and Fox rivers, approved July 7th, 1870, reported by the Secretary of War to be needed, in his communication to the House of Representatives dated March 8th, 1872, one hundred and forty-five thousand dollars."

Afterwards, by a deed dated September 18, 1872, in which the foregoing facts are in substance recited, the Green Bay and Mississippi Canal Company, in consideration of the sum of $145,000, conveyed to the United States all its property and rights of property in and to the said line of water communication, *excepting* the personal property and franchises which the Secretary of War had previously reported to Congress as not needed.

In this instrument I find no refereuce to any outstanding claims against the company for flowage damages, nor do the United States by the terms thereof assume any liability for such claims, or indeed any other claims against the company.

With respect to the claim before mentioned, which the arbitrators found to be a lien upon the property, and which they contemplated to be satisfied out of the amount awarded for the property, I understand that on the advice of Attorney General Williams, a sufficient amount of the purchase money to cover the claim and interest was withheld until it was extinguished.

Thus, as it would seem, there is no ground whatever, either in the proceeding of the arbitrators, the action of the Secretary of War, the legislation of Congress hereinbefore referred to, or in the instrument by which the transfer of the property was made, for alleging *an understanding* or *agreement* on the part of the United States at the time of the purchase, to assume the payment of the damages for flowage, for which the said company was then liable. Since the transfer of the property to the United States by the aforesaid deed, Congress has legislated as follows, with reference to the said improvement:

By an act of March 3, 1873, (17 Stat., 560,) an appropriation of $300,000 was made "for the improvement of the Fox and Wisconsin rivers."

By an act of June 23, 1874, (18 Stat., 237,) an appropriation of $300,000 was made "for continuing the improvement of the Fox and Wisconsin rivers." This act also providing that "not exceeding $25,000 of the above 'may be used for the purchase of such real' estate as may be required for the right of way or for flowing in the completion of the Fox and Wisconsin improvement."

By an act of March 3, 1875, (18 Stat., 456,) an appropriation of $500,000 was made "for the improvement of the Fox and Wisconsin rivers."

By another act of March 3, 1875, (18 Stat., 506,) provision was made for the appropriation of lands, rights of way, etc., for canals and cut-offs, needed for said improvement, in the mode provided by the laws of the state.

This act also contains the following provisions:

"In case any lands or other property is now or shall be flowed or injured by means of any part of the works of said improvement heretofore or hereafter constructed, for which compensation is now or shall become legally owing, and in the opinion of the officer in charge it is not prudent that the dam or dams be lowered, the amount of such compensation may be ascertained in like manner."

The act further provides that, "the Department of Justice shall represent the interests of the United States in legal proceedings under this act, and for flowage damages hereinbefore occasioned," and furthermore, that, "a portion of the appropriation made for the further prosecution of the improvement aforesaid, not exceeding in amount $25,000, may be applied in payment for the property and rights taken and used as aforesaid."

Of the several acts just cited, the only act which it is important to consider in this connection, is the one last mentioned. That act, it will be seen, distinctly provides for ascertaining the mode provided by the laws of the state, as well as the amount of compensation which was at that time legally owing by the United States for lands then flowed or injured by means of any part of the works of said improvement *theretofore constructed*, (when "in the opinion of the officer in charge it is not prudent that the dam or dams be lowered,") as the amount of compensation which might become thus owing for lands flowed or injured by means of any part of said works *thereafter constructed*. The provision comprehends *past* as well as the *future* claims for compensation; but for present purposes it need be considered here only in so far as it concerns the former.

The reference in that act to "the mode provided by the laws of the state," undoubtedly points to the mode provided by the acts of the legislature of Wisconsin, of March 12, 1874, chapter 291, and March 22, 1872, chapter 119, and the proceedings authorized by these acts, all are none other than proceedings to ascertain and determine the compensation to

which the owner of lands are entitled for a *legal taking* or *appropriation thereof* for public purposes. Accordingly the only compensation which Congress could have had in view, is *compensation for private property taken or appropriated* in the manner above described, (*i. e.*, by the flowage of the same by means of the works of said improvement,) *for which the United States were then legally liable;* the mode selected by that body being adapted to the ascertainment of such compensation solely. There can be no question as to the legal liability of the United States, respecting lands flowed by means of any works thereby constructed subsequent to the transfer of the improvement to the Government. The only point in regard to which there seems to be any difficulty, is as to the liability of the United States respecting those lands which were flowed previous to such transfer. On this point I think it may well be conceded, that if, at the period of the transfer, there were any lands flowed by means of the works of said improvement, for which the land owners were then legally entitled to claim compensation as for property taken or appropriated for public purposes, and the United States thenceforth maintained the flowage of the lands in the same manner, and to the same extent, thus as it were adopting the original taking or appropriation thereof, the obligation to pay such compensation devolved upon the United States, not by virtue of any agreement or understanding with said company, (it being very evident from what has been stated, that no such agreement or understanding existed,) but by mere operation of law. For the right to flow the lands as it subsisted before the transfer was a conditional right only, the condition being that of making just compensation therefor to the land owners, and in cases where that condition remained unfilled at the time of the transfer, the Government necessarily took the right subject thereto, (see, for illustration of the principle applicable here, the case of Pfiefer *vs.* Sheboygan and Fond du Lac Railway Company, 18 Wis., 155.) Hence, unless the owners of those lands are

barred by lapse of time, or otherwise, from now claiming compensation for taking or appropriation of their property, their claims for compensation would seem to come within the provisions of the act of 1875, where "in the opinion of the officer in charge, it is prudent that the dam or dams be lowered." But with regard to claims that accrued prior to the transfer of the improvement to the government, the subject matter whereof is *damages* for trespass, or for an illegal invasion of private property, these stand upon a different footing. They are purely *personal*. There has been no assumption of liability on the part of the Government for such claims; nor has the obligation to provide for them otherwise fallen upon it.

I understand that a number of *actions of trespass* for the recovery of damages caused by the flowage of lands were commenced against the Green Bay and Mississippi Canal Company just previous to the transfer of the works to the United States, and that these actions are still pending in the local courts. For reasons just intimated the United States have no interest therein.

By the act of 1875 this department is required to represent the United States in legal proceedings thereunder, "and for flowage damages hereinbefore occasioned." As I interpret this provision, it imposes upon the department the duty of representing the United States in the *statutory proceedings* for the condemning of lands, rights of way, etc., and for the ascertainment of compensation for flowage damage under the acts of Congress above cited. It does not, as it seems to me, authorize the department to interfere in any way with the before-mentioned *common law* suits pending against the said company. The instructions of my predecessors in office of April 16, 1875, will therefore be regarded as modified so as to conform to this view.

The general conclusions at which I have arrived on the subject here discussed may be briefly stated thus:

1. The United States have not, either by agreement or

legislative act, assumed any liability for claims for damages against the Green Bay and Mississippi Canal Company, founded on *trespass*, or, indeed, any other claims of a purely personal character.

2. Yet claims for compensation for lands taken or appropriated by the flowage thereof, by means of the works of said improvement, which existed at the period of the transfer from said company to the United States, became a legal charge upon the latter by mere operation of law, where the Government claimed the right to maintain and thenceforth did actually maintain the flowage by the same means and to the same extent.

3. Claims of this description come within the scope of the act of 1875, (when, in the opinion of the officer in charge, it is not prudent that the dam or dams causing the flowage be lowered,) and such as are not barred by lapse of time or otherwise may be ascertained in the mode there designated.

I am, sir, very respectfully,

EDWARDS PIERREPONT,
Attorney General.